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RECHTSANWÄLTE

European Federation of Energy Traders
Amstelveenseweg 998
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Netherlands

Vaduz, 1 January 2019

Legal Opinion Regarding the Enforceability of Close-Out Netting and the Validity and Enforceability of the EFET General Agreement concerning the Delivery and Acceptance of Electricity and its Collateral Arrangements

Dear Sir or Madam

We have been instructed by European Federation of Energy Traders, Amstelveenseweg 998, 1081 JS Amsterdam, Netherlands (herein referred to as "**EFET**") with email dated November 12, 2018 (herein referred to as the "**Instruction Letter**") to provide a legal opinion ("**Opinion**") addressing the enforceability of close-out netting and the validity and enforceability of the EFET General Agreement (herein referred to as the "**General Agreement**") concerning the delivery and acceptance of electricity and its collateral arrangements.

This Opinion has been issued on the basis of the EFET Standard Instruction Letter and addresses the issues to which the Instruction Letter refers under Liechtenstein law. This Opinion covers all transaction types described in Appendix A (herein referred to as the "**Transactions**") and is given in respect of the Liechtenstein based counterparties according to Appendix B (herein referred to as the "**Counterparties**")

Given the complexity of the issues dealt with in this Opinion, our Executive Summary in Chapter III must be read in conjunction with our general advice outlined in the Opinion and the assumptions made therein. Our assessment in Chapters IV, V, VI, VII, VIII, IX, X and XI in turn must be read in conjunction with our general assumptions in Chapter II and the additional assumptions made, when dealing with certain issues, whereas the answers to the specific questions raised in this Opinion cannot be considered detached from the respective advice and will always have to be read in conjunction therewith.

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ABBREVIATIONS AND DEFINITIONS

"**ABGB**":	Liechtenstein Civil Code (*Allgemeines bürgerliches Gesetzbuch*).
"**BA**":	Liechtenstein Banking Act (*Bankengesetz*).
"**BRRD**":	Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.
"**BRRD-institutions**":	Entities subject to the SAG and as defined in Art. 2 para. 1 lit. (a) to (e) SAG.
"**CCP**":	Liechtenstein Code of Civil Procedure (*Zivilprozessordnung*).
"**Commodity**":	Electricity, emissions allowances, certificates or capacity rights.
"**Commodity Forward**":	A transaction in which one party agrees to purchase a specified quantity of a Commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.
"**Commodity Option**":	A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price.
"**Commodity Swap**":	A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.
"**Collateral Provider**":	Transferor according to the Credit Support Annex.
"**Collateral Taker**":	Transferee according to the Credit Support Annex.
"**Counterparty**":	The Liechtenstein counterparty as defined in Appendix A.

"**Credit Claims**":	Pecuniary claims arising out of an agreement whereby a credit institution, as defined in Art. 4 para. 1 of Directive 2006/48/EC, including the institutions listed in Art. 2 of that Directive, grants credit in the form of a loan.
"**Credit Support Annex**":	EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010).
"**Documents**":	The documents subject to our review and as outlined in Chapter I.
"**EEA**":	Member states of the European Union plus Norway, Iceland and the Principality of Liechtenstein.
"**EFET**":	European Federation of Energy Traders www.efet.org
"**EO**":	Liechtenstein Law on Execution (*Exekutionsordnung*).
"**Fixed Trade**":	An agreement according to which one party is obliged to perform on a fixed date or during a fixed period and it is pre-agreed, that in case of non-performance on the fixed date or during the fixed period the contract will be rescinded (*Fixgeschäft*).
"**FCA-Directive**":	Directive 2002/47/EC (as amended by Directive 2009/44/EC).
"**FCA-Financial Instrument**":	Shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing.
"**General Agreement**":	Each the EFET General Agreement Concerning the Delivery and Acceptance of Electricity, Version 2.1(a)/September 21, 2007 and the EFET General Agreement Concerning the Delivery and Acceptance of Electricity, Version 2.1, published December 20, 2000).
"**IA**":	Insolvency Act (*Konkursordnung*).
"**Insolvency Proceedings**":	Insolvency proceedings initiated over Counterparties under the IA and the specific provisions of the Banking Act and Insurance Supervision Act on the insolvency of Banks and Investment Firms (excluding recovery and resolution proceedings under the Law on Recovery and Resolution of Banks and Investment firms, moratorium proceedings as well as composition

	proceedings).
"Instruction Letter":	E-Mail November 12, 2018.
"IPRG":	Act on International Private Law (*Gesetz über das internationale Privatrecht*).
"MiFID":	Directive 2004/39/EC of 21 April 2004 on markets in financial instruments.
"MiFID II":	Directive 2014/65/EU of May 2014 on markets in financial instruments.
"MTF":	Means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II MiFID (Multilateral trading facility).
"New York Convention":	New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards.
"NVG"	Law on the Composition Agreement (*Gesetz betreffend den Nachlassvertrag*).
"PCA":	Act on Persons and Companies (*Personen- und Gesellschaftsrecht*).
"Physical Commodity Transaction":	A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.
"Right to Preferential Settlement":	Settlement with regard to items which are not property of the relevant debtor and thus are not part of the insolvency estate (*Aussonderungsrecht*).
"Right to Separate Settlement":	Settlement with regard to items, which form a separate estate in insolvency proceedings, out of which the creditor will be satisfied. Any deficit will be treated as a mere claim in insolvency proceedings (*Absonderungsrecht*).
"Relevant Financial Obligations":	Obligations which are secured by a Financial Collateral Arrangement and which give a right to cash settlement and/or delivery of FCA-Financial Instruments whether consisting of present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement), obligations owed to the Collateral Taker by a person other than the Collateral Provider or obligations of a specified class or kind arising from time to time.

"**RSO**":	The Liechtenstein Act on the Protection of Rights (*Rechtssicherungs-Ordnung*).
"**SAG**":	Liechtenstein Law on Recovery and Resolution of Banks and Investment Firms (*Sanierungs- und Abwicklungsgesetz*).
"**SR**":	Law on Property (*Sachenrecht*).
"**Transaction**":	Each transaction concluded between the parties and governed by the General Agreement, for the purchase, sale, delivery and acceptance of electricity, including Options on the purchase, sale, delivery and acceptance of electricity as defined in Appendix B.[1]

[1] As defined in Section 1 of the General Agreement as „Individual Contract".

I. DOCUMENTS

For the purpose of rendering this Opinion, we have reviewed and analysed the following documents (herein collectively referred to as the „**Documents**"):

a) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1(a), published 21 September 2007) (a "**General Agreement**");

b) EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000) (a "**General Agreement**");

c) EFET Credit Support Annex to the General Agreement (Version 2.0, published May, 2010) (hereinafter the "**Credit Support Annex**");

d) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 4.0, published April 3, 2012);

e) EFET Allowances Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 5.0, published February 28, 2018);

f) EFET VAT Annex for use with the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published November 2005);

g) GTMA Appendix to the General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.1, published 20 December 2000 and Version 2.1(a) published 21 September 2007) (Version 1.0, published 11 September 2009);

h) EFET EECS Certificates Master Agreement (Version 1.0, published 14 December 2013);

i) EFET EECS Certificates Appendix to the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 14 December 2013);

j) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 1.0, published 16 December 2013), and

k) Change Letter to amend § 14 (VAT and Taxes) of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (Version 2.0, published 1 October 2015.

For purposes of Chapter VIII (Confirmation Practices) only:

a) Confirmation of Allowance Transactions (including AEUA, EUA, Eligible Kyoto Unit Transactions) (Fixed Price, Third Compliance Period (Phase 3) and Fixed Price, Second Compliance Period (Phase 2) to the Allowances Appendix to the EFET General Agreement Concering the Delivery and Acceptance of Electricity (Version 2.0, published 3 April 2012).

For purposes of Chapter IX (Core Provision) only:

a) EFET Cross Product Payment Netting Agreement (Version 1, published 20 October 2005);

b) EFET Master Netting Agreement (Version 1.0, published June 2010);

c) CPMA Cross-Product Master Agreement (Version February 2000) as amended by the EFET/IECA Commodities Schedule to the Cross-Product Master Agreement (Version 1.0, published 23 June 2003);

d) EFET Cross-Product Credit Support Annex to the CPMA Cross-Product Master Agreement (Version 1.0, published 23 June 2003); and

e) EFET Credit Support Annex to the Master Netting Agreement (Version 1.0 published February 2011).

II. ASSUMPTIONS

For the purpose of rendering this Opinion, we assume:

(a) Two counterparties enter into the EFET General Agreement and at least one of the counterparties is incorporated or organized or has its center of main interest in Liechtenstein and is a counterparty as defined in Appendix A ("**Counterparty**");

(b) The relevant General Agreement is governed by the laws of Germany, or England and Wales.

(c) Each General Agreement and any of the above Annexes (including the Credit Support Annex) is enforceable under the laws of any jurisdiction for the purposes of private international law (other than the laws of Liechtenstein).

(d) Each party has duly authorized, executed and delivered, and has the capacity to enter into the General Agreement and has obtained, complied with the terms of and maintained all authorizations, approvals, licenses and consents required to enable each party to lawfully enter into and perform its obligations under the General Agreement and to ensure the legality, validity, enforceability or admissibility in evidence of the General Agreement in Liechtenstein.

(e) The General Agreement accurately reflects the true intentions of each party.

(f) The provisions of the General Agreement have not been altered in any material respect, whereas elections made by using the respective schedules do not consist a change in material respect.

(g) Pursuant to the terms and conditions of the General Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the General Agreement, the counterparties over time enter into a number of individual contracts which include all of the individual contracts described in Appendix B ("**Transactions**").

(h) The Transactions provide for the physical delivery of commodities, certificates or emission rights in exchange for cash, however, some of them may also provide for cash settlement.

(i) The General Agreement and the pursuant Transactions are entered into prior to the commencement of any insolvency proceedings, recovery proceedings or resolution proceedings of any kind under the laws of any jurisdiction against either party.

(j) At the time at which the Transactions are entered into under the General Agreement, neither party has actual notice of the insolvency of the other party or should have been aware of the insolvency of the other party.

(k) The General Agreement has been entered into and each of the Transactions referred to therein are carried out, by each of the parties thereto, in good faith, for the benefit of each of them respectively, on arm's length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.

Please kindly note that additional specific assumptions may made in connection with the relevant sections of this Opinion.

III. EXECUTIVE SUMMARY

This Executive Summary does not form part of this Opinion and is only given for convenience purposes.

A. CLOSE-OUT NETTING

Transactions entered into under the General Agreement constitute bilateral contractual obligations according to Liechtenstein law. In the case of mutually unperformed bilateral contracts the insolvency administrator will be granted the right to either rescind or request performance of the contract, when insolvency proceedings are commenced over the assets of a Liechtenstein entity. With regard to insolvency proceedings concerning the writer of an option, the obligations of the writer will cease by virtue of law as a consequence of the commencement of insolvency proceedings concerning the writer prior to the exercise of such an option. For further information in this regard we refer to Chapter IV B.

As the commencement of insolvency proceedings under the IA does not circumvent the set-off of claims in general, set-off is permissible according to the provisions and under the restrictions set out therein. Furthermore, Art. 33 para. 4 IA explicitly stipulates that set-off shall be permissible with regard to certain agreements and according to the legal materials in this regard, Transactions excluding Physical Commodity Transactions conducted under the General Agreements shall be covered by Art. 33 para. 4 IA. In conclusion, a Liechtenstein insolvency court will recognize the validity of the netting provisions set out in the General Agreement and they will thus be enforceable according to Liechtenstein insolvency law. With regard to special considerations in connection with the insolvency of certain types of Counterparties, we refer to our remarks in Chapter IV E, F and G.

As outlined in Chapter IV C certain transactions may be challenged according to the RSO. Even though one cannot exclude the risk that Transactions may become subject to a challenge either by a creditor or the insolvency administrator, we are of the opinion that Transactions concluded under the General Agreement should become subject to such challenges, as long as the Transactions have not been entered in the intention to disadvantage or favour certain creditors and the counterparty was not nor should have been aware of such an intention. Special attention must be paid regarding the contestability of the provision or substitution of collateral.

Furthermore, a Liechtenstein Counterparty may apply for a moratorium either under the NVG or the law applicable to the particular type of Counterparty. With regard to the NVG during such moratorium proceedings set-off is only permissible in accordance with the provisions set out in the NVG. As the relevant provision set out in the NVG regarding the permissibility of set-off concerning certain agreements, is congruent with the respective provision of the IA, we refer to Chapter IV D in this regard and draw the same conclusion – in particular that the netting provisions of the General Agreement will be enforceable in case of moratorium proceedings – as in Chapter IV B. With regard to special considerations concerning certain types of Counterparties, we refer to our remarks in Chapter IV E, F and G.

B. NETTING FOR MULTI-BRANCH PARTIES

In cases where separate insolvency proceedings are initiated in Liechtenstein over the assets of a Counterparty or branch of a foreign legal entity and the receiver or liquidator and the Liechtenstein courts would not include the position of foreign branches or the foreign legal entity under the General Agreement, the enforceability of the close-out netting under the General Agreement on a multi-branch basis might not be ensured.

Whether there would be a separate proceeding initiated in Liechtenstein with respect to the assets and liabilities of the Liechtenstein branch of a foreign legal entity upon commencement of foreign insolvency proceedings over the legal entity, or whether the assets and liabilities of the Liechtenstein branch would be handled as part of the foreign proceedings depends on the type of entity involved.

A branch in Liechtenstein of a foreign legal entity being a corporation has its own legal personality with regard to the claims and liabilities entered into or to be fulfilled in the Principality of Liechtenstein, even if pursuant to the law in force at the head office it does not possess such capacities.[2] In such cases creditors or the debtor[3] may initiate insolvency proceedings over the assets of a Liechtenstein branch ("*Filialkonkurs*" according to Art. 114 para. 3 PCA).

If the foreign legal entity is licensed as Credit Institution under Art. 4 (1) No. 1 Regulation (EU) No 575/2013 in an EEA Member State or if the foreign legal entity is a licensed bank in Switzerland, no separate insolvency proceedings over the legally dependent local branch can be initiated upon commencement of foreign insolvency proceedings regarding the legal entity. Thus, the relevant authorities in Liechtenstein would in such case defer to the foreign proceedings so that the assets and liabilities of the branch would be handled as part of the respective proceedings.

C. COLLATERAL

According to the Credit Support Annex Eligible Credit Support shall mean either Cash or a Letter of Credit. As outlined below, we do not render an opinion on Letters of Credit as these merely constitute a contractual obligation of the bank vis-à-vis the Collateral Taker and no ownership rights can be acquired regarding such obligations under Liechtenstein law. Furthermore, we are of the opinion that there is no legal basis to take Letters of Credits into account when determining the Termination Amount.

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[2] Art. 119 para. 1 PCA, Art. 130 para. 1a PCA, Art. 236 para. 4 PCA.
[3] In specific cases also other parties, such as a liquidator pursuant to Art. 130 para. 4 PCA.

In addition, believe Liechtenstein law will not be decisive in determining whether Cash collateral has validly been created where the relevant contractual relationship, which may either be the relationship between the Collateral Taker and the account maintaining bank in case of a wire transfer or the relationship between the Collateral Provider and the respective account maintaining bank in case of an assignment of claims for security purposes, is not governed by Liechtenstein law.

We conclude that a collateral arrangement created under the Credit Support Annex will be deemed a Title Transfer and thus the respective provisions of the implementation law as stipulated in Art. 392 et seqq. SR apply, if:

(1) both, the Counterparty and its counterparty qualify as professional market participants or one of them as a professional and the other as a semi-professional financial market participant and both are located in the EEA or Switzerland;

(2) the Eligible Credit Support consists of Cash, FCA-Financial Instruments or Credit Claims in accordance with Art. 392 para. 2 (4), (5) and (12) SR; and

(3) the respective collateral serves the purpose of securing Relevant Financial Obligations.

Art. 392 et seqq. SR provides for the recognition of the title transfer for Cash collateral in Liechtenstein. In order to create a valid Cash collateral, the general requirements of the provision of financial collateral as outlined above have to be complied with.

If, however, Art. 392 et seqq. SR are not applicable Liechtenstein law does not provide for or recognize ownership or the transfer of ownership in cash credited to a bank account. Cash deposited in an account with a bank legally constitutes a payment claim of the account holder against the bank or institution, which maintains the account. In the event of an assignment of the claim to the Collateral Taker (e.g. the Collateral Provider is the account holder), the account-holding bank must be informed of this assignment and the Collateral Taker will bear the insolvency risk of the bank. If Art. 392 et seqq. SR are not applicable, transfer will be re-characterised and qualified as an assignment of claims and other assignable rights for security purposes which will be treated as pledges in the case of insolvency.[4] As a consequence of the re-characterization as assignment of claims and other assignable rights for security purposes, the provisions regarding pledges and concerning the necessity of publicity regarding a pledge provision must be met. Otherwise the transfer of ownership title will not be considered valid. If the ownership title was transferred in accordance with the provisions regarding pledges, the Collateral Taker will be treated as a preferential creditor upon the commencement of insolvency

[4] Art. 23 para. 3 IA; LES 1992, 144; LES 1993, 12.

proceedings over the assets of the Collateral Provider, but will not have Right to Preferential Settlement

D. GENERAL ENFORCEABILITY

We are of the Opinion that the provisions of the General Agreement do not violate the Liechtenstein *ordre public* according to Art. 6 IPRG and will thus be enforceable in Liechtenstein.

IV. ENFORCEABILITY OF CLOSE-OUT NETTING UNDER LIECHTENSTEIN LAW

A. ASSUMPTIONS

In addition to the general assumptions set out above, we assume the following for the purpose of rendering our opinion on the enforceability of the close out netting provisions of the General Agreement:

a) The relevant General Agreement is governed by English or German law;

b) After entering into the Transactions and prior to the maturity thereof, the Counterparty as the party located in Liechtenstein, becomes subject of voluntary or involuntary insolvency proceedings under the laws of Liechtenstein and, subsequent to the commencement of insolvency proceedings, either that party or an insolvency official seeks to assume the confirmations representing profitable transactions for the insolvent party and reject the confirmations representing unprofitable transactions for the insolvent party.

B. INSOLVENCY ACT

(a) General Remarks on Liechtenstein Insolvency Proceedings

1. The Liechtenstein Insolvency Act contains the main and general provisions regarding insolvency proceedings commenced with regard to Liechtenstein Counterparties. However, according to Art. 1 para. 7 IA, the BA and SAG shall apply to Banks and Investment Firms in reorganisation and winding-up, while the ISA shall apply to Insurance Companies in reorganisation and winding-up. Only if the BA, SAG and ISA do not contain specific provisions the IA shall also apply to the Counterparties mentioned above. Insolvency proceedings initiated over Counterparties under the IA and the specific provisions of the Banking Act and Insurance Supervision Act on the insolvency of Banks and Investment Firms (excluding recovery and resolution proceedings under the Law on

Recovery and Resolution of Banks and Investment firms, moratorium proceedings as well as composition proceedings) are herein referred to as "**Insolvency Proceedings**".

2. Insolvency proceedings under the IA may be initiated either by an application of the debtor or of a creditor, both under the prerequisite that the debtor is either insolvent (*zahlungsunfähig*)[5] or overindebted (*überschuldet*)[6]. Whereas a debtor will be considered insolvent, if he is not in a position to pay (all) his due debts due to the lack of ready means of payment and it is unlikely that the debtor will obtain sufficient means of payment in a timely manner,[7] the definition of overindebtedness is based on two facts. The liabilities of the debtor, which may not be a natural person but only a legal entity, must exceed its assets and the prospects for the debtor's survival must be negative (*negative Fortbestehensprognose*).[8] As the Counterparties qualify as legal entities, both insolvency and overindebtedness are valid grounds to commence insolvency proceedings with regard to the Counterparties under the IA.

3. In general Liechtenstein insolvency proceedings under the IA cover all domestic and foreign movable assets, domestic immovable assets belonging to the debtor at the time of commencement of the proceedings as well as assets acquired by the debtor in the course of the proceedings (*Universalitätsprinzip*).[9] With respect to the foreign movable assets, the competent foreign authority shall be asked to deliver the assets of the insolvent Counterparty situated in Liechtenstein from abroad to Liechtenstein provided that no international treaty prevents the foreign authority from doing so. In the event of foreign insolvency proceedings over a Liechtenstein Counterparty, (provided no insolvency proceedings have been initiated in Liechtenstein) the foreign insolvency authority shall receive the movable assets of the Liechtenstein Counterparty upon request after satisfaction of certain rights (e.g. Right to Preferential Settlement and Right to Separate Settlement), provided that reciprocity is granted.

4. With the commencement of insolvency proceedings, the debtor will be deprived of the right to freely dispose of the assets of the insolvency estate. According to Art. 15 IA the legal effects of the insolvency proceedings commence on the day following the publication of the bankruptcy notice (*Konkursedikt*) in the Official Gazette. Thus, starting from that date any legal acts that the debtor conducts after the opening of insolvency proceedings and which are relating to the insolvency estate are invalid vis-à-vis the creditors. Furthermore, legal disputes aiming to assert or secure claims regarding assets

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[5] Art. 8 IA.
[6] Art. 9 IA.
[7] *Dellinger* in *Konecny/Schubert*, Insolvenzgesetze, § 66 KO Rz 5.
[8] *Dellinger* in *Konecny/Schubert*, Insolvenzgesetze, § 67 KO Rz 1 et seqq.
[9] Art. 5 para. 1 IA.

belonging to the insolvency estate can neither be instituted nor continued after the commencement of Liechtenstein insolvency proceedings, already pending legal disputes shall be suspended.

(b) Bilateral Contracts in Insolvency Proceedings

5. As the General Agreement and the Transactions conducted thereunder impose obligations to both contracting parties, both are considered bilateral contracts under Liechtenstein law, subsequently the provisions regarding the faith of such bilateral contracts in case of insolvency of the Liechtenstein Counterparty are of relevance.

6. As already mentioned above, the commencement of insolvency proceedings will effect that the debtor no longer may dispose of the assets which are part of the insolvency estate and the invalidity of legal acts of the debtor relating to the insolvency estate. During insolvency proceedings only the court appointed insolvency administrator has the right to administer and represent the insolvency estate. In consequence, the debtor may not enter into new Transactions upon the opening of insolvency proceedings.

7. With regard to transactions concluded before the commencement of insolvency proceedings, the IA distinguishes between bilateral contracts that (a) have been fulfilled by one party and (b) that remain unperformed by both parties. In the first case (fulfilled contracts) and depending on the party owing performance, either the insolvent party will have a claim for performance against its counterparty, which will not be affected by the commencement of insolvency proceedings, or the solvent party will have a claim for performance against the debtor and will thus become a creditor to the insolvency estate and have a mere claim in insolvency proceedings after the commencement of such.

8. With regard to mutually unperformed contracts the IA grants the insolvency administrator the right to either perform the contract in place of the debtor and in return demand performance by the contracting party, or rescind the contract (*cherry picking*).[10] For the qualification as a mutually unperformed contract it is noteworthy, that if the performance owed is divisible – as is the delivery of electricity in the absence of a contradictory agreement – and one party has already partially performed its obligations under the contract prior to the commencement of insolvency proceedings, the contract will be divided. With regard to the partially performed obligations either the debtor will be granted a claim against the creditor or the creditor will have a claim in insolvency proceedings, the unperformed part of the respective contract will however be considered a mutually unperformed contract.[11] Continuing contracts ("*Dauerschuldverhältnisse*") will

[10] Art. 34 para. 1 IA.
[11] Art. 34 para. 4 IA.

be considered divisible contracts and thus dealt with in accordance with the above. In conclusion, the abovementioned right to choose (cherry picking) will only apply with regard to mutually unperformed contracts or the mutually unperformed part of a divisible contract, e.g. the mutually unperformed part of a continuing contract.

9. If the insolvency administrator decides to rescind the contract, the creditor will be granted a claim for damages arising out of the non-performance of the contract which, however, is only considered a mere insolvency claim.[12] If the insolvency administrator chooses to sustain the reciprocal contractual obligations and the solvent party is contractually obliged to perform in advance, the solvent party may refuse performance until the debtor has either performed or the debtor's performance has been secured accordingly. However, the solvent party will only benefit of the respective legal provision if it was not and did not have to be aware of the poor financial situation of the debtor at the time the relevant contractual obligation was entered into.[13]

10. With regard to bilateral contractual obligations that stipulate the obligation of one party to deliver goods which have a market or stock exchange price under the condition that the delivery is made at a fixed time or during a fixed period (*Fixgeschäft* "**Fixed Trade**") and the fixed date or the end of the fixed period occur after the commencement of insolvency proceedings, the insolvency administrator will not be granted the right to choose mentioned above. Rather, the contract will be rescinded automatically and the solvent party will subsequently be granted a claim for damages for non-performance.[14] However, the above qualification as Fixed Trade not only requires a fixed delivery time or period but the obligation of delivery must be concluded under the prerequisite that in case of non-performance in the fixed time period or at the fixed time, the contract will automatically be rescinded.[15] As the Fixed Trade term used in the IA reflects § 919 ABGB, only contracts concluded under the prerequisite that the contract shall automatically be rescinded in case of delayed delivery, will also be subject to automatic recession upon the commencement of insolvency proceedings. In such cases the creditor will only be granted a claim for damages which will have to be calculated in accordance with Art. 35 para. 2 IA.

11. As mentioned above, the Transactions concluded under the General Agreement consist of Commodity Options, Commodity Forwards, Commodity Swaps and Physical Commodity Transactions all of which provide for reciprocal obligations which is why the Transactions will be deemed bilateral contracts in Liechtenstein insolvency proceedings.

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[12] Art. 34 para. 2 IA.
[13] Art. 34 para. 3 IA.
[14] Art. 35 IA.
[15] § 919 para. 1 ABGB; *Reischauer* in *Rummel*, ABGB[3] § 919 Rz 1 et seqq.

As Commodity Forwards as well as Physical Commodity Transactions provide for the obligation to deliver electricity on a fixed date to a pre-agreed price, one could be under the impression that these Transactions constitute a so called Fixed Trade.

12. The General Agreement contains various provisions, dealing with the delay of performance or non-performance. § 8 of the General Agreement stipulates that in case of a delay in delivery or acceptance the respective counterparty will automatically be granted a claim for damages. Furthermore, § 9 of the General Agreement contains provisions regarding non-performance and according to § 10. 5. (a) the General Agreement may be terminated in the event of non-performance as defined therein. With regard to a delay in delivery, or failure of delivery the General Agreement may be terminated according to the provisions set out in § 10. 5. (d). § 10 .5. (d) stipulates that in cases of failure of delivery or acceptance of electricity pursuant to a Transaction for more than seven consecutive days or more than seven days in aggregate within a period of sixty days, the General Agreement may be terminated. The fact that a delay in delivery does according to this provision not lead to an automatic recession of the individual contract prevents a qualification as a Fixed Trade.

13. In conclusion and as delivery under a Fixed Trade may not be permissible after the fixed date, or outside of the fixed time period, and the provisions set out in the General Agreement contain stipulations with regard to a delay in or lack of performance, which do not effect an automatic recession of the Transaction, we are of the opinion that the Transactions concluded under the General Agreement will not be considered Fixed Trades.

14. Subsequently, no automatic recession of the respective mutually non-performed Transactions will take place upon the commencement of insolvency proceedings with regard to the Counterparty. In consequence, the insolvency administrator will, under the assumption that no close-out netting takes place, have the possibility to either demand performance of the Transaction or rescind the respective Transaction consisting of Physical Commodity Transactions, Commodity Forwards and Commodity Swaps according to Art 34 IA.

15. With regard to Commodity Options Art. 40 IA is of relevance as the writer of a Commodity Option will only grant the holder of the option the right, but not the obligation to buy or sell electricity and Art. 40 para. 3 IA stipulates that such obligations of the writer – prior to the exercise of such an option – will cease by virtue of law, as soon as insolvency proceedings are commenced over the assets of the writer. However, insolvency

proceedings opened with regard to the holder and prior to the exercise of an option, do not affect[16] the rights of the holder and the obligations of the writer respectively.

(c) Close-Out Netting under Liechtenstein Insolvency Law

16. Besides the general provisions on the effects of the commencement of insolvency proceedings on contractual obligations, the Liechtenstein IA contains provisions governing the netting of mutual positions and the subsequent set-off (*Aufrechnung*) in the case of such proceedings.

17. In general, the commencement of insolvency proceedings does not circumvent the set-off of claims.[17] However, in specific cases outlined in Art. 33 para. 1 IA a set-off is not permissible. In particular, set-off is impermissible, if the creditor only becomes a debtor of the insolvency estate after insolvency proceedings have been commenced or the relevant claim against the debtor has been acquired only after the opening of such proceedings. The same is valid, in cases where the creditor has in fact acquired his claim prior to the commencement of insolvency proceedings over the assets of the debtor, but, at the time of acquisition of said claim, was or should have been aware of the insolvency or overindebtedness[18] of the debtor.

18. Anyhow, set-off is generally permissible if the respective claim has been acquired 6 months prior to the commencement of the relevant insolvency proceedings or the creditor was obliged to assume the claim, and the creditor neither was nor should have been aware of the insolvency or overindebtedness of the debtor.[19]

19. In addition to the general provisions outlined above, Art. 33 para. 4 IA explicitly recognizes the set-off with regard to claims deriving from the following agreements that have been terminated due to the initiation of insolvency proceedings (close-out netting):

    i. Derivative transactions mentioned in Appendix II of the Regulation (EU) No. 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, including derivative instruments for the transfer of credit risks;

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[16] Such rights and obligations will only be affected by the commencement of insolvency proceedings over the assets of the holder of an option, if circumstances indicate an opposed intention on the part of the writer.
[17] Art. 32 IA.
[18] Art. 9 para. 2 IA.
[19] Art. 33 para. 2 IA.

ii. Derivative transactions that do not fall within the clause above dealt in a regulated market or in the multilateral trading system (MTS) or concluded in a framework agreement as well as spot transactions;

iii. Repurchase transactions according to Art. 4 (1) no 83 of the Regulation (EU) No 575/2013;

iv. Securities lending transactions; and

v. Financial collaterals according to Art. 392 ff. SR;

and,

if it is agreed that the respective abovementioned agreements shall be automatically terminated, or may be terminated by one counterparty in the case of commencement of insolvency proceedings according to the IA with regard to the assets of the other counterparty and that all mutual claims arising from the abovementioned agreements shall be offset upon termination.

20. The legal materials to Art. 33 para. 4 IA[20] stipulate that prior to the implementation of MiFID II derivatives transactions relating to commodities which must or may be settled upon maturity through effective delivery, provided that they are traded on a regulated market or in a multilateral trading system in the EEA are subject to Art. 33 para. 4 lit. no. 1.

21. However, the legal materials also clarify that emission certificates and all derivative contracts traded in an organised trading system, which will be considered financial instruments under MiFID II, will fall within the scope of Art. 33 para. 4 lit. a no. 1 IA after incorporation of MiFID II into the EEA acquis. The national transposition of MiFID II is already completed and the respective amendments to the relevant acts of law entered into force on 3 January, 2018. However, MiFID II is not yet part of the EEA acquis, the current state of implementation is that the respective draft joint committee decision is under consideration and from today's point of view it is difficult to estimate when MiFID II will be incorporated in the EEA Agreement.

22. Art. 33 para. 4 lit. a no. 1 IA does not cover derivative transactions relating to commodities which must be settled on maturity by effective delivery and which are not traded on a regulated market or MTF in the EEA and do not have the characteristics of other

[20] BuA 92/2016, 204 et seqq.

derivatives pursuant to Art. 38 MiFID Regulation 1287/2006, as well as transactions in energy wholesale. Subsequently and especially to also cover commodity futures (*Termingeschäft*) transactions concluded under framework agreements of e.g. the EFET the Liechtenstein legislator implemented Art. 33 para. 4 lit a. no. 2 IA based on Section 20 para. 4 Austrian Insolvency Act[21]. The respective legal materials stipulate, that Art. 33 para. 4 lit. a no. 2 IA was explicitly implemented to cover commodity futures concluded under framework agreements such as the General Agreement. In this regard please kindly note that Physical Commodities Transactions will not fall within the applicability of Art. 33 para. 4 IA and will not profit of the permissibility of set-off.

23. Since Art. 33 para. 4 has been amended on the basis of Section 20 para. 4 Austrian Insolvency Act and the respective legal materials to the in large parts similar Austrian provision stipulate, that the implementation of said provision aims to eliminate the risk of a possible grave negative impact on the competitiveness of Austria, which would occur if the permissibility of close-out netting of transactions under the General Agreement was not ensured by law, we are of the opinion that the same applies with regard to Liechtenstein.

24. With regard to automatic termination, Art. 33 para. 4 IA stipulates that set-off shall be recognized with regard to claims arising from certain agreements[22] that have been terminated due to the commencement of insolvency proceedings, if it has been agreed that the respective agreement shall automatically be terminated or may be terminated by one counterparty in case of the commencement of insolvency proceedings according to the IA with regard to the assets of the other counterparty and that all mutual claims arising from the abovementioned agreements shall be offset upon termination. Thus, Liechtenstein law allows that parties agree on the termination in the case of insolvency proceedings (Default Event according to § 10. 5. (c)) and recognizes close-out netting with regard to the respective agreements irrespective of automatic termination being selected, as far as Art. 33 para. 4 IA is applicable.

25. **In conclusion, Transactions entered into under the General Agreement will benefit from the explicit recognition of netting provisions according to Art. 33 para. 4 IA.**

26. Liechtenstein law does not contain provisions regarding the determination of the termination amount in the case of close-out netting as outlined above. This due to the fact that Liechtenstein law only protects contractually agreed close-out netting and does not provide for statutory netting – unlike e.g. Germany[23]. Against this background the

[21] Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO), idF BGBl I 122/2017.
[22] See above.
[23] § 104 German Act on Insolvency Law.

Liechtenstein legislator has recognized that provisions regarding the determination of the respective termination amount may under circumstances impede contractual netting and has subsequently decided that this shall be subject to the parties' disposition within party autonomy. **Liechtenstein law will thus recognize the calculation of the Termination Amount in accordance with § 11 of the General Agreement.**

(d) Netting Permissibility in Relation to the Insolvency Administrator's Right to Choose

27. As mentioned above Transactions entered into under the General Agreement are on the one hand considered bilateral contracts and in case where the Transactions are mutually unperformed at the time of commencement of insolvency proceedings over the Liechtenstein counterparty, the insolvency administrator will be granted a right to choose with regard to the recession or performance of the respective contract according to Art. 34 IA. On the other hand Art. 33 para. 4 explicitly permits close-out netting with regard to the Transactions entered into under the General Agreement. Subsequently it must be assessed, whether the general enablement of close-out-netting takes precedence over the election right of the insolvency administrator with regard to mutually unperformed contracts.

28. In this regard, Art. 39 para. 1 IA stipulates that the parties to a contract cannot invoke agreements which exclude or limit the applicability of Arts. 34 to 38 IA and thus, the right of the insolvency administrator to decide whether a contract is to be rescinded or performed cannot contractually be waived. However, Art. 39 para. 2. IA clarifies that what was said before[24] shall not prevent the parties to agree on a right of termination in the event of commencement of insolvency proceedings with regard to a contracting party, in particular where contracts in accordance with Art. 33 para. 4 IA are concerned. Furthermore, the legal materials stipulate that Art 33 para. 4 IA aims to protect contractual close-out netting agreements against the insolvency administrator's right to cherry pick.[25]We believe that the general acceptance of close-out netting principles precludes any cherry picking rights for mutually unperformed and partly performed contracts.

29. **In conclusion, the netting provisions set out in the General Agreement will be recognized by Liechtenstein insolvency courts where insolvency is commenced with regard to a Counterparty according to the IA and the insolvency administrator will not be granted the right to choose between demanding performance and rescinding the Transactions.**

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[24] Reference is made to Art. 39 para. 1 IA.
[25] BuA 92/2016, 207.

C. TRANSACTION AVOIDANCE

30. The RSO provides for provisions regarding transaction avoidance and thus granting certain possibilities to challenge specific Transactions entered into by the debtor. According to Art. 115 RSO transactions may be challenged either by the insolvency administrator or by a creditor whose claim has not been fully satisfied in the insolvency proceedings.

31. Regarding the question whether specific transactions may be challenged in cross-border cases, the law of the domicile of the debtor, in this case Liechtenstein, will be decisive according to Art. 75 para. 1 RSO with regard to the question if and when transactions can be challenged. However, it is a prerequisite for the challenge of a legal transaction under Liechtenstein law, that also the law applicable to the transaction itself (in this case the laws of Germany or England) must support a challenge.[26] Hence, creditor's claims need to pass two tests. If either one of the two laws (law of debtor's domicile and law applicable to the transaction) does not entitle the creditor to challenge the transaction at all, the claim must fail. In other words, if the applicable German or English law would not allow the challenge of the respective transaction, such a challenge would have to fail under Liechtenstein law. If, however, both laws entitle the creditor to the challenge, but differ in terms of legal requirements or the statute of limitations, the provision, which would prevail would be the provision which is more favorable to counterparty of the debtor.

32. According to the RSO certain transactions entered into by the debtor within one year before approval of enforcement, such as e.g. gratuitous dispositions may be challenged by the insolvency administrator or a not fully satisfied creditor.[27] Furthermore, the following transactions entered into within one year before approval of enforcement, but at a time the debtor was already overindebted may be challenged:

    (a) Granting a pledge or comparable rights with the same effect in order to secure an existing obligation, whereby the debtor has never been under a legal or contractual obligation to secure the fulfilment of such an obligation

    (b) the fulfilment of a monetary debt in any other way than cash or other usual means of payment; or

    (c) the payment of claims not yet due,

    if the beneficiary of the transaction cannot prove that he was not aware of the financial situation of the debtor at the relevant time.

[26] Art. 75 para. 1 and 2 RSO.
[27] Art. 65 RSO.

33. Especially transactions according to the provisions set out in Section 17 of the General Agreement regarding "Performance Assurance" as defined therein, may, in light of the above, be subject to possible challenge. This information is only provided for the sake of completeness. Please note that, as our instruction only covered an assessment regarding the enforceability of the netting provisions of the General Agreement and covering this issue would necessitate further scrutiny, we do not render any opinion thereon.

34. In addition to the abovementioned cases the RSO provides for a general right to challenge a transaction, if the respective transaction was entered into with the discernible intention to disadvantage or favour certain creditors.[28] As a general remark, Art. 74 RSO stipulates that a Transaction has to be challenged within five years from the date of the Transaction.

35. In light of the above and even though the risk of challenge cannot be excluded, we are of the opinion, that as long as the Transactions are not being entered in intention to disadvantage or favour creditors and the solvent counterparty was not and should not have been aware of such an intention, the Transactions should not become subject to promising challenges under the RSO. With regard to the invalidity of Transactions entered into after the commencement of insolvency proceedings, please refer to Chapter IV B (a).

D. MORATORIUM ACCORDING TO THE NVG

36. The NVG is applicable to all debtors located in Liechtenstein, whereas specific provisions apply to Banks, Investment Firms and Insurance Companies. The NVG grants a debtor located in Liechtenstein the possibility to apply for a moratorium of two months, which may be extended for another two months upon application, with the competent Liechtenstein court. If the debtor is granted a moratorium the court will appoint a guardian that will supervise the actions taken by the debtor.

37. Similar to Liechtenstein insolvency proceedings under the IA, proceedings according to the NVG do not prohibit set-off in general. However, Art. 9b NVG stipulates that set-off is impermissible, if the creditor only becomes a debtor of the party of the moratorium proceedings after such have been commenced or the relevant claim against the debtor has been acquired only after the opening of such proceedings. The same rule applies, in cases where the creditor has in fact acquired his claim prior to the commencement of moratorium proceedings but, at the time of acquisition of the claim, was or should have been aware of the insolvency of the debtor.

[28] Art. 67 para. 1 RSO.

38. The provision explicitly allowing set-off with regard to certain agreements[29] is congruent to the respective provision contained in the IA[30] and the legal materials concerning the amendment of Art. 33 para. 4 IA explicitly refer to Art. 9b NVG in this regard. Consequently, we refer to our assessment in Chapter IV B (c) with regard to the applicability of the expressive permission of close-out netting under Art. 9b NVG.

39. **In conclusion, the netting provisions of the General Agreement will be enforceable in cases where the debtor is granted a moratorium under the NVG.**

E. BANKING ACT

(a) Insolvency Proceedings

40. The BA applies to Banks and Investment Firms as defined in Appendix B and contains specific provisions for the insolvency of Banks and Investment Firms. If the BA does not provide for specific provisions regarding the insolvency of Banks and Investment Firms, the IA will be applicable. The specific provisions of the BA also apply to institutions subject to the SAG according to Art. 54 para. 2 BA. As no provisions in the BA contradict Art. 33 para. 4 IA, Art. 33 para. 4 IA is also applicable with regard to Banks and Investment Firms subject to insolvency proceedings.

41. **Thus, the enforceability of close-out netting provisions in the General Agreement is also guaranteed in the event of insolvency proceedings of Banks and Investment Firms.** However, the SAG provides for restrictions on the enforceability of close-out netting provisions in the General Agreements concluded by institutions that are subject to resolution proceedings under the SAG (see Chapter IV F).

(b) Moratorium according to the BA

42. In addition to insolvency proceedings, Banks and Investment Firms can undergo two different moratorium proceedings under the BA.

43. According to Art. 42 para. 1 BA Banks that are unable to meet their liabilities on time may apply to the court in Liechtenstein for a moratorium and any legal acts that the Bank undertakes after closing its counters or submitting the application for moratorium and prior to the appointment of the interim trustee shall not be valid vis-à-vis their creditors.[31] After consultation with the Financial Market Authority the court in Liechtenstein shall grant a moratorium for the duration of one year, unless the Bank is overindebted. The

[29] Art. 9b para. 3 NVG.
[30] Art. 33 para. 4 IA.
[31] Art. 42 para. 3 BA.

duration of the moratorium may be extended for an additional year and only in justified cases in accordance with Art. 43 para. 1 BA. If the court in Liechtenstein grants the moratorium, it shall appoint respectable, reliable, and knowledgeable persons as commissioners for the Bank[32] and the Bank shall continue its business operations under the supervision of the commissioner and in accordance with the commissioner's instructions during the moratorium.[33] The Bank may not undertake any legal acts that adversely affect the legitimate interests of the creditors or that favor individual creditors to the disadvantage of others according to Art. 47 para. 2 BA. Payments to creditors may only be made with the consent of the commissioner. The commissioner is authorized to order payments to be made to the creditors from receipts from due claims of the Bank according to the commissioner's best judgment. The interests of creditors privileged by legal transaction or law as well as the interests of small creditors shall be appropriately taken into account. In any event, the payments to creditors may not exceed one half of the amounts available in accordance with the assets as determined by the commissioner.[34] For the duration of the moratorium, execution may be levied against the debtor only until attachment and rating. Petitions for realization or bankruptcy may not be granted.[35]

44. In addition to the abovementioned moratorium proceedings, Banks can undergo specific moratorium proceedings as outlined in Art. 57 et seqq. BA. If the court in Liechtenstein grants the application for a composition moratorium, it shall appoint a definitive trustee unless a commissioner has already been appointed as trustee in accordance with Art. 57 BA. According to Art. 59 BA, the composition moratorium shall last for six months and may, if necessary, be extended by six months. Any legal acts that the bank undertakes after closing its counters or after submitting the application and prior to the appointment of the interim trustee shall not be valid vis-à-vis their creditors.[36] The creditors shall be publicly called upon to assert any objections to the draft composition agreement made available for their inspection. No creditors' meeting shall be held. The composition agreement shall be approved if the amount offered is in the proper proportion to the ancillary means of the debtor, the execution of the composition agreement and the complete satisfaction of the recognized privileged creditors are secured, and, after examination of all circumstances, it results that the interests of the body of creditors are safeguarded better by the composition agreement than by liquidation in bankruptcy.[37]

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[32] Art. 45 para. 1 BA.
[33] Art. 47 para. 1 BA.
[34] Art. 48 BA.
[35] Art. 50 BA.
[36] Art. 59 para. 3 BA.
[37] Art. 59a BA.

45. The BA stipulates in Art. 60o para. 1 that in general the law of the state in which moratorium proceedings, insolvency proceedings as well as resolution measures under the SAG are initiated, shall apply with regard to the respective proceedings in the absence of contrary provisions.

46. The impact of the initiation of insolvency proceedings and moratorium proceedings is stipulated in Art. 60s BA. Pursuant to Art. 60s BA, the right of a creditor to set-off a claim by the Bank or Investment Firm with the creditor's claim shall not be affected by the initiation of such proceedings, if this offset is permissible according to the law applicable to the claim of the Bank or Investment Firm. However, this provision does not prevent a creditor from claiming the invalidity, contestability or the ineffectiveness of a legal act under the laws applicable to the proceedings according to Art. 60s para 2 BA. The law applicable to offset agreements shall exclusively apply to such agreements, irrespective of Art. 87 and 90 SAG and according to Art. 60u BA. A creditor may contest a legal act by which one creditor has been favored in disadvantage of the other creditors, if the laws of an EEA-member state are applicable and this legal act is not contestable under the applicable law.[38]

47. It is not conclusively settled whether the provisions in Art. 60b to 60z BA are applicable only in cases where the counterparty of said Bank is located in an EEA-Member State, or Switzerland, or whether Banks and Investment Firms are always subject to Art. 60b to 60z BA, irrespective of where the counterparty is located. There is legal writing in Liechtenstein stating that Art. 60b BA to Art. 60z BA, which also include pro-visions on the applicable law of close-out netting provisions, only applies for agreements between EEA-banks and EEA-investment firms.[39] One may argue that this position is supported by the legal materials, as they state that Art. 60a to 60z refer only to EEA-Member States, and that the recognition of actions taken by authorities outside of the EEA has to be subject to Art. 5 IA. However, the law does not make such limitations as regards the location of the counterparty in the relevant provisions and it would be inconsistent to have two insolvency regimes for Banks, depending on the location of the counterparty. Particularly, under the assumption that the Bank will have a number of counterparties in different jurisdictions. One may therefore also argue that the legal materials simply refer to the issue of recognition rather than insolvency proceedings in general. It is correct that the recognition of Liechtenstein insolvency proceedings in accordance with the BA is harmonized in the EEA and therefore Liechtenstein will recognize EEA proceedings and vice-versa, the recognition of such proceedings by non-EEA authorities is, in contrast to that, subject to applicable foreign laws and Liechtenstein is also not generally obliged to

[38] Art. 60x BA.

[39] *Sonja Schwaighofer*, Liechtenstein implements the Bank Recovery and Resolution Directive and Revises its Netting Legislation, in the INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION, May 2017, page 37, 38.

recognize non-EEA proceedings. To conclude, the applicability of Articles 60b to 60z BA remains unclear and it is advisable for counterparties not situated in the EEA and Switzerland do not rely on the applicability of Articles 60a to 60z BA.

48. **Considering the above, with respect to creditors situated in the EEA and Switzerland, the enforceability and validity of close-out netting provisions in the General Agreement has to be assessed under the laws applicable to the General Agreement, irrespective of the initiation of moratorium proceedings or insolvency proceedings of Banks and Investment Firms under the BA**. A contestation of a legal act by which one creditor has been favored in disadvantage of the other creditors may only be assessed under Liechtenstein law, if the laws of an EEA-member state are applicable and this legal act is not contestable under the applicable law.

F. LAW ON RECOVERY AND RESOLUTION OF BANKS AND INVESTMENT FIRMS

49. Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms ("**BRRD**") was implemented in Liechtenstein on January 1, 2017 with the Law on Recovery and Resolution of Banks and Investment firms ("**SAG**"). The following legal entities are subject to the SAG:

(a) Institutions (defined in Art. 3 para. 1 no. 69 SAG as Banks or Investment Firms according to Art. 3 BA);

(b) Financial institutions where the financial institution is a subsidiary of a Bank or Investment firm, or of a company referred to in section (c) or (d), and is covered by the supervision of the parent undertaking on a consolidated basis in accordance with Articles 6 to 17 of Regulation (EU) No 575/2013;

(c) Financial holding companies, mixed financial holding companies and mixed-activity holding companies;

(d) Parent financial holding companies in a EEA-member state, EEA-parent financial holding companies, parent mixed financial holding companies in a EEA-member state and EEA parent mixed financial holding company; and

(e) Branches of institutions that are established outside the EEA in accordance with specific conditions laid down in the SAG.

50. The SAG contains several provisions dealing with close-out netting, whereas termination rights are defined in Art. 3 para. 1 no. 85 SAG as the right to terminate a contract, a right

to accelerate, close out, set-off or net obligations or any similar provision that allows an obligation of a party to the contract to be modified, suspended or extinguished or a provision that prevents an obligation under the contract from arising that would otherwise arise. The term "netting agreement" under the SAG means an arrangement under which a number of claims or obligations can be converted into a single net claim, including close-out netting arrangements under which, on the occurrence of an enforcement event (however or wherever defined) the obligations of the parties are accelerated so as to become immediately due or are terminated, and in either case are converted into or replaced by a single net claim, including set-off arrangement as a result of termination and close-out netting as defined in Art. 392 (2) no 11 SR. Set-off arrangements are agreements under which two or more claims or obligations owed between the institution under resolution and a counterparty can be set off against each other.[40] The close-out netting provisions of the General Agreement fall within the discussed definitions of the SAG.

51. According to the SAG, BRRD-Institutions are obliged to draw up and continually up-date an appropriate recovery plan about measures to be taken in the case of substantial deterioration of their financial situation. The recovery plan shall be presented for inspection to the FMA as resolution authority in Liechtenstein. Further, the resolution authority shall prepare a resolution plan for each BRRD-Institution. According to the SAG resolution tools are the following:

    (a) Sale of business tool: Under the sale of business tool, the resolution authority may dispose of the institution or all its business activities or any part of it under normal commercial conditions, without requiring the consent of the shareholders or otherwise complying with applicable procedural requirements. Where possible, the resolution authority shall sell the institution or the parts of its business activities on the market.

    (b) Bridge institution tool: The bridge institution tool enables the resolution authority to transfer all or part of the business activities of an institution to a publicly controlled company. A bridge company is only temporarily active because the aim is to sell the company to the private sector as soon as market conditions allow.

    (c) Asset separation: The asset separation tool is intended to enable the resolution authority to transfer impaired or problematic assets to an asset management vehicle, which then manages them and liquidates them over time. The assets should be transferred at fair value so that any losses are recognised at the time of the transfer.

[40] Art. 3 para. 1 no. 14 SAG.

In order to minimise distortions and for other reasons, this instrument should only be used in conjunction with other resolution tools.

(d) Bail-in tool: With the bail-in tool, the resolution authority is empowered to write off the claims of unsecured creditors of a failing institution and to convert the claims into equity. This instrument can be used to recapitalise a failing institution or institution that is likely to fail so that it can be restructured in the course of the resolution procedure and its viability restored following the reorganisation and restructuring. This gives the resolution authority more flexibility in managing with the failure of large, complex financial institutions. At the same time, the management, which is responsible for the problems of the institute, will be replaced and a plan for the continuation of the company will be implemented.

52. According to Art. 38 SAG the resolution authority shall take a resolution action in relation to a Bank or Investment Firm only if all of the following conditions are met:

(a) the determination that the Bank or Investment Firm is failing or is likely to fail has been made by the FMA, after consulting the resolution authority;

(b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with Art. 78 para. 2 taken in respect of the Bank or Investment Firm, would prevent the failure of the Bank or Investment Firm with-in a reasonable timeframe;

(c) a resolution action is necessary in the public interest pursuant to Art. 40.

53. At any time, BRRD-institutions shall meet a minimum requirement for own funds and eligible liabilities. The minimum requirement shall be calculated as the amount of own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution. For this purpose, derivative liabilities shall be included in the total liabilities on the basis that full recognition is given to counterparty netting rights.[41] With respect to the minimum requirements of own funds and eligible liabilities, the counterparty's netting rights have to be recognized.

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[41] Art. 58 para. 1 and 2 SAG.

54. The exercise of termination rights and the applicability of close-out netting can be restricted on the basis of resolution measures, or events directly linked to such measures, such as for example the following:

The provisions implementing Art. 63 and 64 BRRD, in particular Art. 82 SAG, provides for the general powers of the resolution authority, including the power to close-out and terminate financial contracts or derivatives contracts according to Art. 66 SAG. Further, Art. 83 SAG entitles the resolution authority to cancel or modify the terms of a contract to which the institution under resolution is a party.

A crisis prevention measure or a crisis management measure taken in relation to a BRRD-Institution, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, under a contract entered into by the BRRD-Institution, be deemed to be an enforcement event within the meaning of Directive 2002/47/EC or as insolvency proceedings within the meaning of Directive 98/26/EC provided that the substantive obligations under the contract, including payment and delivery obligations and the provision of collateral, continue to be performed. A crisis prevention measure or a crisis management measure, including the occurrence of any event directly linked to the application of such a measure, shall not, per se, make it possible for anyone to:

(a) exercise any termination, suspension, modification, netting or set-off rights, including in relation to a contract entered into by a subsidiary, the obligations under which are guaranteed or otherwise supported by a group entity, or any group entity, which includes cross-default provisions;

(b) obtain possession, exercise control or enforce any security over any property of the BRRD-Institution concerned or any group entity in relation to a contract which includes cross-default provisions; or

(c) affect any contractual rights of the BRRD-Institution concerned or any group entity in relation to a contract which includes cross-default provisions, provided that the substantive obligations under the contract, including payment and delivery obligations, and provision of collateral, continue to be performed.

However, this provision shall not affect the right of a person to take an action referred to above in (a) to (c), where that right arises by virtue of an event other than the crisis prevention measure, the crisis management measure or the occurrence of any event directly linked to the application of such a measure. A suspension or restriction under Article 88, 89 or 90 SAG (see below) shall not constitute non-performance of a contractual obligation for the purposes of this provision.

According to Art. 88 SAG, implementing Art. 69 BRRD, the resolution authority has – with few exceptions – the power to suspend any payment or delivery obligations pursuant to any contract to which a BRRD-Institution is a party, from the publication of a notice of the suspension until midnight of the following business day. When a payment or delivery obligation would have been due during the suspension period, the payment or delivery obligation shall be due immediately upon expiry of the suspension period. The payment or delivery obligation of the institution under resolution's counterparties under that contract shall be suspended for the same period of time.

Art. 89 SAG transposes Art. 70 BRRD and provides for the power of the resolution authority to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution under resolution from the publication of a notice until midnight of the following business day.

In addition, Art. 90 SAG, implementing Art. 71 BRRD, stipulates that the resolution authority has the power to suspend termination rights of contracts. However, this requires that all payment and delivery obligations and the provision of collateral continue to be performed.

55. As already mentioned, Art. 60u BA stipulates that, without prejudice to Art. 87 SAG and Art. 90 SAG, netting agreements shall be governed solely by the law of the contract which governs such agreements, however, Art. 60u BA only applies to General Agreements concluded between a Bank, Investment Firm, BRRD-Institution on the one hand and a counterparty situated in the EEA or Switzerland on the other hand (see Section 44). Thus, even if the resolution measures according to Art. 87 and Art. 90 SAG have been taken by the resolution authority, Art. 60u BA ensures the enforceability of close-out netting provisions in the General Agreement in Liechtenstein for EEA-counterparties and Swiss-counterparties, provided that netting is allowed under the law applicable to the agreements.

56. However, the exercise of the bail-in tool by a resolution authority may have an impact on the enforceability of the close-out netting provisions of the General Agreement. Art. 56 SAG implementing Art. 44 BRRD deals with the scope of the bail-in tool. The resolution authority shall not exercise the write-down and conversion powers in relation to secured liabilities including covered bonds and liabilities in the form of financial instruments used for hedging purposes which form an integral part of the cover pool and which are secured in a way similar to covered bonds.[42] Secured liabilities means a liability, where the right of the creditor to payment or other form of performance is secured by a charge, pledge

[42] Art. 56 para. 2 lit b SAG.

or lien, or collateral arrangements including liabilities arising from repurchase transactions and other title transfer collateral arrangements according to Art. 3 para. 1 no 24 SAG. In relation to a liability arising from a derivative, the resolution authorities shall exercise the write-down and conversion powers only upon or after closing-out the derivatives in accordance with Art. 66 SAG. Upon entry into resolution, resolution authorities shall be empowered to terminate and close-out any derivative contract for that purpose. Where a derivative liability has been excluded from the application of the bail-in tool under Art. 57 para. 1 SAG (exclusion of certain liabilities from the application of the write-down or conversion powers where the bail-in tool is applied as outlined in Art. 44 para. 3 BRRD), resolution authorities shall not be obliged to terminate or close-out the derivative contract. Where derivative transactions are subject to a netting agreement, the resolution authority or an independent valuer shall determine as part of the valuation under Art. 45 to 48 SAG the liability arising from those transactions on a net basis in accordance with the terms of the agreement. The value of liabilities arising from derivatives shall be determined in accordance with the following:

(a) appropriate methodologies for determining the value of classes of derivatives, including transactions that are subject to netting agreements;

(b) principles for establishing the relevant section in time at which the value of a derivative position should be established; and

(c) appropriate methodologies for comparing the destruction in value that would arise from the close-out and bail-in of derivatives with the amount of losses that would be borne by derivatives in a bail-in.

57. With regard to the use of resolution measures, Art. 96 SAG, implementing Art. 77 BRRD, provides for some protections for set-off and close-out netting arrangements by preventing the transfer of a part, but not all, of the rights and liabilities that are protected under a netting agreement as well as the modification or termination of rights and liabilities protected under such netting arrangement by using ancillary powers. Such protection requires that the contracting parties are allowed to set-off or net claims and liabilities. However, notwithstanding the above the resolution authority may, where necessary in order to ensure availability of the covered deposits:

(a) transfer covered deposits which are part of any of the close-out netting arrangements without transferring other assets, rights or liabilities that are part of the same arrangement; and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

Thus, subject to the limitations set out above, a resolution authority has to protect close-out netting provisions in accordance with Art. 96 SAG when using a resolution measure.

58. Art. 97 SAG also provides for some protection for liabilities secured under a security arrangement by preventing the following:

(a) the transfer of assets against which the liability is secured unless that liability and benefit of the security are also transferred;

(b) the transfer of a secured liability unless the benefit of the security are also transferred;

(c) the transfer of the benefit of the security unless the secured liability is also transferred; or

(d) the modification or termination of a security arrangement through the use of ancillary powers, if the effect of that modification or termination is that the liability ceases to be secured.

Notwithstanding the above, where necessary in order to ensure availability of the covered deposits the resolution authority may:

(a) transfer covered deposits which are part of any of the security arrangements without transferring other assets, rights or liabilities that are part of the same arrangement; and

(b) transfer, modify or terminate those assets, rights or liabilities without transferring the covered deposits.

Thus, subject to the limitations set out above, a resolution authority has to protect liabilities secured under a security arrangement in accordance with Art. 97 SAG when using a resolution measure.

59. All in all, resolution measures as stipulated in Art. 87 SAG and Art. 90 SAG do not affect the enforceability of the close-out netting provisions in the General Agreement concluded between a Counterparty and an EEA-counterparty or Swiss-counterparty as such provisions shall be governed solely by the law of the contract which governs such

agreements (Art. 60u BA). If other resolution measures have been taken by the resolution authority that may override the close-out netting provisions in the General Agreement, the resolution authority has to take account of the set-off and close-out netting arrangements by preventing the transfer of a part, but not all, of the rights and liabilities that are protected under a netting agreement as well as the modification or termination of rights and liabilities protected under such netting arrangement by using ancillary powers (Art. 96 SAG). Furthermore, the use of the bail-in tool may have an effect on the enforceability of the close-out netting provisions in the General Agreement. An evaluation of the precise effects of resolution or recovery proceedings under the SAG over a Counterparty would, however, require further analysis.

G. INSURANCE SUPERVISION ACT

60. As already mentioned above, specific provisions on the insolvency proceedings of Insurance Companies are stipulated in the ISA, in particular in Art. 152 et seqq. ISA. The ISA implements the Directive 2001/17/EC of 19 March 2001 on the reorganisation and winding-up of insurance undertakings and 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance. The ISA applies to Insurance Companies as defined in Appendix A.

61. Insolvency proceedings of an Insurance Company in Liechtenstein take effect in the EEA and Switzerland, thus all assets of the Insurance Company situated in the EEA and Switzerland are subject to the insolvency proceedings in Liechtenstein according to Art. 160 ISA. Decisions of EEA member states on recovery measures and the initiation of liquidation proceedings are recognized in Liechtenstein irrespective of Art. 5 (2) IA.[43] Similar to the respective provisions in the BA Art. 168 para. 1 ISA stipulates that the law applicable to recovery and liquidation proceedings is the law of the state in which such proceedings are initiated in the absence of contrary provisions. However, the right of a creditor to set-off a claim by the Insurance Company with the creditor's claim shall not be affected by the initiation of such proceedings, if this offset is permissible according to the law applicable to the claim of the Insurance Company.[44] This provision does not prevent a creditor from claiming the invalidity, contestability or the ineffectiveness of a legal act under the laws applicable to the proceedings according to Art. 172 para. 2 ISA. A creditor may contest a legal act by which one creditor has been favored in disadvantage of the other creditors, if the laws of an EEA-member state are applicable and this legal act is not contestable under the applicable law.[45]

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[43] Art. 164 ISA.
[44] Art. 172 para. 1 ISA.
[45] Art. 174 ISA.

62. Also with regard to Insurance Companies, moratorium proceedings can be initiated in accordance with Art. 159 et seqq. ISA.

H. SPECIFIC QUESTIONS

63. *Automatic Termination: Would you recommend to elect Automatic Termination to apply upon a Material Reason described in § 10.5(c) of the EFET General Agreement or upon other events not specified therein?*

With regard to Transactions within the scope of Art. 33 para. 4 IA close-out netting will be recognized irrespective of the fact whether or not automatic termination has been selected.

Concerning such Transactions that do not benefit from the special provisions in Art. 33 para. 4, such as Physical Commodity Transactions, the general provisions of the IA with regard to set-off are of relevance. In Liechtenstein there is no jurisprudence similar to the jurisprudence of the Austrian Supreme Court. However, as the legal situation in Austria and Liechtenstein is comparable in this regard, it is likely that the Liechtenstein Supreme Court will consult Austrian jurisprudence in this regard and decide in line with such.

Subsequently, whether reciprocal claims and obligations resulting of an early termination of the Transactions are considered to be such, that have already existed as conditional claims and obligations at the time of commencement of insolvency proceedings or to be such, established only upon commencement of insolvency proceedings will be material. As contractually agreed close-out netting provisions are deemed valid and enforceable in Austria, we believe that the same will apply with regard to Liechtenstein.

In light of the above, we recommend opting for Automatic Termination with regard to Transactions not falling within the scope of Art. 33 para. 4 IA e.g. Physical Commodity Transactions, whereas the Early Termination Date should be the date of occurrence with regard to the first Material Reason triggering early termination. Thus, Section 10. para. 3 lit. a would have to be amended accordingly.

Based on the assumption, that Automatic Termination shall only apply with regard to Section 10 para. 5 lit. c no. iv of the General Agreement we are happy to propose the following additional provision:

> *"§10.4 shall apply to [Liechtenstein Party] only upon occurrence of one of the Material Reasons specified in Section 10.5 (c) (iv) with termination effective*

(i) in case of the filing of a petition for the opening of any kind of insolvency proceedings or any other proceedings having an analogous effect by
(a) [Liechtenstein Party] or its Credit Support Provider against itself ("Eröffnungsantrag des Schuldners" pursuant to Art. 6 Liechtenstein Insolvency Act),
(b) [Liechtenstein Party]'s Credit Support Provider against [Liechtenstein Party] as of 11.59 pm, on the day before the filing of such petition;

(ii) in case of the filing of the petition for the opening of any kind of insolvency proceedings or any other proceedings having an analogous effect by a third party (other than [Liechtenstein Party] or its Credit Support Provider; "Eröffnungsantrag eines Gläubigers" pursuant to Section 7 Liechtenstein Insolvency Act) as of 11.59 pm on the day before the filing of such petition, unless such filing (as are referred to in Section 10.5 (c)(iv)) is withdrawn, dismissed, discharged, stayed or restrained within a period of ten (10) Business Days from its filing."

64. *Are the provisions in § 11 of the EFET General Agreement providing for the netting of all positive and negative Settlement Amounts in determining the Termination Amount enforceable under the laws of Liechtenstein or is there a risk that such determination could be challenged by a liquidator, receiver or third party?*

The provision of § 11 of the General Agreement providing for the netting of termination amounts in determining a single close-out amount upon insolvency of a Counterparty are enforceable under Liechtenstein law. However, what was said with regard to transaction avoidance (see Chapter IV C) must be borne in mind.

65. *Do the laws of Liechtenstein recognize that the close-out netting provisions in §§ 10 to 11 of the EFET General Agreement apply to all Individual Contracts or could it be challenged by a liquidator, receiver or third party? Would we need the single agreement concept in order to preserve the enforceability of the termination right and the ability to calculate a net amount?*

In our opinion, the single agreement concept is essential to prevent possible *cherry picking* regarding bilateral mutually non performed contracts (see Section 8), as we believe that the right of the insolvency administrator to either perform the contract in place of the debtor and in return demand performance by the contracting party, or rescind the contract will in lack of a single agreement clause enable the insolvency administrator to exercise the rights mentioned above with regard to the single Transactions.[46]

66. *Is the insolvent counterparty obligation to pay the amount of any compensation claim in Euro, USD or GBP (as agreed between the parties in the Election Sheet) enforceable under the laws of Liechtenstein or could the calculation in a foreign currency be challenged by a liquidator, receiver or third party?*

We are of the opinion that the calculation itself in a foreign currency will not give reason for a challenge. However, we note that a court will not enforce a claim for the termination amount in a foreign currency but in the appraised value in Swiss Francs. Furthermore, a claim in a foreign currency cannot be proven in insolvency proceedings without being converted into Swiss Francs at the date of opening of insolvency proceedings.

67. *Please specify, if and as applicable, the degree to which termination and close-out rights in case of opening of insolvency proceedings, against a party based in your jurisdiction are dependent upon, or otherwise affected by, the status of one or more of the concerned parties falling within a particular category of classification of entity. Specifically, do these rights differ as the result of a party being a financial institution, ordinary corporate entity or any other categorization or regulatory or legal status?*

In this regard we refer to Chapters IV E, F and G dealing with special provisions regarding Banks, Investment Firms and Insurance Companies.

I. NON-INSOLVENCY RELATED MATERIAL REASONS

68. As termination rights are in principal subject to party autonomy and set-off is recognized under the conditions set out by law, the right of termination for non-insolvency related material reasons as set out in § 10 para. 5 lit. (a), (b), (d), (e) and (f) and the related netting provision are enforceable under Liechtenstein law, subject to general qualifications set out in our Opinion.

V. CLOSE-OUT NETTING FOR MULITI-BRANCH PARTIES

A. ASSUMPTIONS

69. In addition to the general assumptions outlined in Chapter II as well as the special assumptions made in Chapter IV A we assume the following for the purpose of assessing close-out netting for multi-branch parties, whereas assumption (a) will only be significant

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[46] *Ebner/Paulmeier* in *Zerey*, Finanzderivate[4], 893.

with regard to Liechtenstein multi-branch parties, assumptions (b) and (c) are of relevance for our assessment with regard to foreign multi-branch parties:

(a) The Counterparty has entered into Transactions under the General Agreement through offices in Liechtenstein as well as through one or more branches located abroad. After entering into these Transactions and prior to the maturity thereof, the Counterparty becomes subject of voluntary or involuntary proceedings under the insolvency laws of Liechtenstein.

(b) A counterparty (Party "F") incorporated, organized or having its centre of main interest in a country (Country "H") other than Liechtenstein has entered into Transactions under the General Agreement both through its home office and through one or more branches located in other countries including in each case a branch of Party F located in and subject to the laws of Liechtenstein (the "Liechtenstein Branch")

(c) After entering into these Transactions and prior to the maturity thereof, Party F becomes subject of voluntary or involuntary proceedings under the insolvency laws of country H.

For the purpose of this Legal Opinion we assume that branch has to be interpreted in line with Art. 4 (1) No. 17 of Regulation (EU) No 575/2013 as 'a place of business which forms a legally dependent part of an institution and which carries out directly all or some of the transactions inherent in the business of institutions'. Thus, subsidiaries are not considered to be branches for the purpose of this Opinion.

B. INSOLVENCY ACT

70. As already sectioned out in Chapter IV B above, the IA applies to all insolvency proceedings initiated with regard to assets of a Liechtenstein Counterparty, whereby the BA, SAG and ISA contain specific provisions applicable to Banks, Investment Firms and Insurance Companies. Liechtenstein insolvency proceedings under the IA cover all domestic and foreign movable assets as well as domestic immovable assets that belong to the debtor at the time of commencement of insolvency proceedings as well as assets that the debtor acquires in the course of the insolvency proceedings ("*Universalitätsprinzip*" according to Art. 5 para. 1 IA). With respect to the foreign movable assets, the competent foreign authority shall be asked to deliver the assets of the insolvent Counterparty situated in Liechtenstein from abroad to Liechtenstein provided that no international treaty prevents the foreign authority to do so.[47]

[47] Art. 5 para. 1 IA.

71. In the event of foreign insolvency proceedings of a Liechtenstein Counterparty and where no insolvency proceedings have been initiated in Liechtenstein, the foreign insolvency authority shall receive the movable assets of the debtor in Liechtenstein upon request after satisfaction of specific rights (e.g. Right to Preferential Settlement and Right to Separate Settlement), provided that reciprocity is granted.[48]

C. ACT ON PERSONS AND COMPANIES

72. The PCA provides for the possibility to establish a branch of a foreign legal entity. However, specific provisions are applicable to Banks, Investment Firms and Insurance Companies.

73. Under the general provisions of the PCA, Liechtenstein law shall be applicable for the establishment, amendment and dissolution of a branch of a foreign legal entity in Liechtenstein. The relationship of the branch to the head office shall be determined, however, by the law in force at the head office according to Art. 236 para. 1 and 2 PCA. A branch of a foreign legal entity in Liechtenstein has to be registered in the commercial register and has its own legal personality with regard to the claims and liabilities entered into or to be fulfilled in the Principality of Liechtenstein, even if pursuant to the law in force at the head office it does not possess such capacities.[49] In such cases creditors or the debtor[50] may initiate insolvency proceedings over the assets of a Liechtenstein branch ("*Filialkonkurs*" according to Art. 114 para. 3 PCA). Under the general principles of the IA, all domestic and foreign movable assets as well as all domestic immovable assets of the branch are covered from the insolvency proceedings. In light of the legal personality of the branch in Liechtenstein, it cannot be said that claims and liabilities of the head office generally would be considered in the Liechtenstein insolvency proceedings over the branch.

74. There are no explicit provisions in the PCA on the legal capacity of a foreign branch of a legal entity domiciled in Liechtenstein, i.e. of a branch established in a jurisdiction other than Liechtenstein. Under the general principles, the legal capacity and the capacity to act, including the capacity for tortious liability, shall be determined according to the law applicable to the legal entity. In particular, this law shall decide on the establishment, amendment, and dissolution of a legal entity, on the organization, rights and obligations of the individual bodies, the legal position of a member, the acquisition and loss of membership. Where a foreign legal entity does not have legal capacity or the capacity to act or the capacity for tortious liability pursuant to this applicable law, but would have

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[48] Art. 5 para. 2 IA.
[49] Art. 119 para. 1 PCA, Art. 130 para. 1a PCA, Art. 236 para. 4 PCA.
[50] In specific cases also other parties, such as a liquidator pursuant to Art. 130 para. 4 PCA.

legal capacity according to Liechtenstein law, the latter shall be applicable for its activities within the Principality of Liechtenstein.[51] As regards branches of a Liechtenstein legal entity established outside of Liechtenstein, conducting business outside of Liechtenstein, we believe that the legal capacity of such branch has to be assessed under the law of the state in which the branch is domiciled. Only with regard to activities in Liechtenstein, a foreign legal entity shall be deemed to have legal capacity to act, irrespective of such capacity under its home country law.

75. The Liechtenstein insolvency proceedings with regard to a Liechtenstein entity will cover all movable assets belonging to such entity, irrespective of their location. If a branch of said entity is located outside of Liechtenstein and does have legal personality under the law of the state where the branch conducts business, the assets of such branch would not legally be assigned to the Liechtenstein entity. As a consequence, the assets of such branch would not be covered from the Liechtenstein insolvency proceedings over the Liechtenstein legal entity. If, however the branch does not have its own legal capacity under the law of the state where it conducts business, the assets of that branch would be covered from the insolvency proceedings over the Liechtenstein legal entity.

D. BANKING ACT

76. The BA contains specific provisions for cross-border insolvency proceedings in Art. 60b BA to Art. 60z BA. Pursuant to Art. 60a the relevant provisions (60b to 60z) shall be applicable to all Banks licensed in an EEA Member State or Switzerland as well as Investment Firms[52]. It is not conclusively settled, if the provisions Art. 60b BA to Art. 60z BA only apply to Transactions with counterparties licensed in the EEA and Switzerland (see Section 44 above).

77. Liechtenstein courts are competent to initiate insolvency proceedings over a Bank granted a license in Liechtenstein according to Art. 60b BA and according to the conflict-of-laws rules in the BA, Liechtenstein law shall – with certain exceptions – be applicable to the insolvency proceedings and recovery or resolution proceedings, where the proceedings were initiated in Liechtenstein. Insolvency proceedings commenced upon a Bank or an Investment Firm in Liechtenstein have (irrespective of Art. 5 IA) effects on all immovable assets of the Bank or Investment Firm in other countries of the EEA.[53] The BA does not explicitly refer to the assets of branches of such Banks or Investment Firms, however, according to the legal materials[54], assets of branches are covered by insolvency

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[51] Art. 235 para. 1, 2 and 6 PCA.
[52] Investment firms according to Art. 4 (1) No. 2 Directive 575/2013/EC and their EEA-branches.
[53] Art. 60e BA.
[54] See BuA 2004/71, p. 9 and 15.

proceedings with regard to the Bank and Investment Firm. A branch under the BA as well as under Directive 2001/24/EC must be interpreted as legally dependent branch pursuant to Art. 4 (1) No. 17 of Regulation (EU) No 575/2013.[55] Within the EEA, the Directive 2001/24/EC provides for the mutual recognition and enforcement of decisions concerning the reorganization or winding up of institutions in all EEA-Member States, covering also such branches in EEA-Member States.[56] All assets and liabilities of an EEA-institution shall be dealt with in a single process in the home Member State of the institution.[57]

78. The same rules apply for recovery or resolution proceedings according to the SAG.[58]

79. Considered this, separate insolvency proceedings over the assets of a legally dependent branch of a bank or investment firm licensed in the EEA cannot be initiated. This applies to cases where a Bank has established branches in other EEA Members States as well as to cases where EEA banks have established branches in Liechtenstein. Decisions of EEA-authorities on the initiation of insolvency proceedings have to be recognized in Liechtenstein in accordance with Art. 60i BA.

80. In contrast to that, separate insolvency proceedings over the assets of a Liechtenstein branch of a bank or investment firm whose registered office is outside the EEA and Switzerland can be initiated in Liechtenstein in accordance with the general provision of Art. 114 para. 3 PCA. If a bank whose registered office is outside the EEA or Switzerland has branches in at least two EEA-Member States, the court in Liechtenstein must inform the FMA without delay of the decision to grant a moratorium, composition moratorium or to initiate insolvency proceedings over the assets of the Liechtenstein branch and the specific consequences of such decision. The FMA shall without delay communicate such decision and the withdrawal of the license to the competent authorities of the other host EEA-Member States in which the bank has established branches and which are included in the list published annually in the official Journal of the European Union pursuant to Article 14 of Directive 2006/48/EC. Where possible, the competent administrative and judicial authorities and liquidators shall coordinate their actions as stipulated by Art. 60n BA. In the event of at least two EEA-branches of non-EEA banks, each EEA-branch is considered as independent company.[59] Thus, in the event of the initiation of separate insolvency proceedings over the assets of a Liechtenstein branch of a non-EEA bank or

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[55] See Art. 3 (2) BA and Art. 2 Directive 2001/24/EC, Art. 2 (1), No. 17 BRRD. A branch pursuant to Art. 4 (1) No. 17 Regulation (EU) No 575/2013 is defined as 'a place of business which forms a legally dependent part of an institution and which carries out directly all or some of the transactions inherent in the business of institutions'.
[56] Recital 119 BRRD.
[57] Recital 119 BRRD; regarding a group of companies (*"Konzern"*), no single process takes place, for each group company, separate insolvency proceedings can be initiated (BuA 2004/71, p. 15 and 16).
[58] Art. 60a (2) BA.
[59] BuA 2004/71, page 24; Recital 22 of Directive 2001/24/EC.

investment firm, the FMA shall establish cooperation with the competent authorities of other EEA-Member States branches of the non-EEA bank or investment firm, if any. In the event of the insolvency of a Bank with non-EEA branches, Liechtenstein authorities will not generally claim jurisdiction over assets of non-EEA branches of a Bank. However, this primarily depends on whether such branch will have legal personality within the state of establishment.

E. INSURANCE SUPERVISION ACT

81. As outlined above, the ISA provides for provisions on cross-border insolvency of Insurance Companies. Separate insolvency proceedings over a Liechtenstein branch of an insurance company within the EEA and Switzerland cannot be initiated in Liechtenstein. Furthermore, decisions of foreign authorities in the EEA and Switzerland on the initiation of insolvency proceedings have to be recognized in Liechtenstein.[60] With regard to a Liechtenstein branch of an insurance company outside the EEA and Switzerland, the ISA stipulates that in the event of two EEA-branches of an insurance company outside the EEA, each EEA-branch is considered as independent company in relation to insolvency proceedings. The competent authorities have to take efforts to cooperate according to Art. 158 ISA.

F. SPECIFIC QUESTIONS

82. *Would there be any change in your conclusions reached under IV above based upon the fact that the Counterparty has conducted business under the General Agreement on a multi-branch basis prior to its insolvency?*

Yes. In cases where separate insolvency proceedings are initiated in Liechtenstein over the assets of a Counterparty or branch and the receiver or liquidator and the Liechtenstein courts would not include the position of foreign branches or the foreign legal entity under the General Agreement, the enforceability of the close-out netting under the General Agreement on a multi-branch basis might not be ensured.

83. *Would the General Agreement be treated as a single unified agreement by the Liechtenstein receiver under the laws of Liechtenstein, regardless of the treatment of the General Agreement or Individual Contracts by an insolvency official in a country where close-out netting may be unenforceable?*

As mentioned above, insolvency proceedings according to the IA regarding the Counterparty cover all domestic and foreign movable assets as well as domestic

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[60] Art. 164 ISA.

immovable assets that belong to the debtor. If a branch of said entity is located outside of Liechtenstein and does have legal personality under the law of the state where the branch conducts business, the assets of such branch would not legally be assigned to the Liechtenstein entity. As a consequence, the assets of such branch would not be covered from the Liechtenstein insolvency proceedings over the Liechtenstein legal entity.

84. *Would there be separate proceedings in Liechtenstein with respect to the assets and liabilities of the Liechtenstein Branch upon the start of the insolvency proceeding for Party F in Country H? Or would the relevant authorities in Liechtenstein defer to the proceedings in Country H, so that the assets and liabilities of the Liechtenstein Branch would be handled as part of the proceedings for Party F in Country H? Could local creditors of the Liechtenstein Branch initiate separate proceedings in Liechtenstein even if the relevant authorities in Liechtenstein did not do so?*

Whether there would be a separate proceeding initiated in Liechtenstein with respect to the assets and liabilities of the Liechtenstein Branch at the start of the insolvency proceeding for counterparty F in Country H or whether the assets and liabilities of the Liechtenstein Branch would be handled as part of the proceeding for counterparty F in Country H depends in which category of counterparty F would fall.

A branch in Liechtenstein of a foreign legal entity being a corporation has to be registered in the commercial register and has its own legal personality with regard to the claims and liabilities entered into or to be fulfilled in the Principality of Liechtenstein, even if pursuant to the law in force at the head office it does not possess such capacities.[61] In such cases creditors or the debtor[62] may initiate insolvency proceedings over the assets of a Liechtenstein branch ("*Filialkonkurs*" according to Art. 114 para. 3 PCA).

If F is licensed as Credit Institution under Art. 4 (1) No. 1 Regulation (EU) No 575/2013 in an EEA Member State or if F is a licensed bank in Switzerland, no separate insolvency proceedings over the legally dependent local branch at the start of the insolvency proceedings for F in Country H can be initiated in Liechtenstein (not even upon application of a creditor). Thus, the relevant authorities in Liechtenstein would defer to the proceedings in Country H so that the assets and liabilities of the branch would be handled as part of the proceedings for F in Country H.

If Bank F is not licensed as Credit Institution under Art. 4 (1) No. 1 Regulation (EU) No 575/2013 in an EEA Member State or not a licensed bank in Switzerland, we believe that separate insolvency proceedings can be initiated over the Liechtenstein Branch.

[61] Art. 119 para. 1 PCA, Art. 130 para. 1a PCA, Art. 236 para. 4 PCA.
[62] In specific cases also other parties, such as a liquidator pursuant to Art. 130 para. 4 PCA.

Basically the same is valid for EEA Insurance Companies.

85. *If there were separate proceedings in Liechtenstein with respect to the assets and liabilities of the Liechtenstein Branch, would the receiver or liquidator in Liechtenstein and the Liechtenstein courts, based on the facts above, include Party F's position under the EFET General Agreement, in whole or in part, among the assets of Liechtenstein and, if so, would the receiver or liquidator and the Liechtenstein courts recognize the close-out netting provisions of the EFET General Agreement in accordance with their terms?*

Under the general principles of the IA, all domestic and foreign movable assets as well as all domestic immovable assets of the branch are covered from the insolvency proceedings. In light of the legal personality of the branch in Liechtenstein, it cannot be said that claims and liabilities of the head office generally would be considered in the Liechtenstein insolvency proceedings over the branch. With regard to Banks, Investment Firms and Insurance Companies we refer to our assessment in Chapters V D and E.

86. *Please consider your answer to your question assuming instead that Party F has no branch located in Liechtenstein, but has assets in Liechtenstein.*

In the event of foreign insolvency proceedings of a foreign entity and where no insolvency proceedings have been initiated in Liechtenstein, the foreign insolvency authority shall receive the movable assets of the debtor located in Liechtenstein upon request after satisfaction of specific rights (e.g. Right to Preferential Settlement and Right to Separate Settlement), provided that reciprocity is granted.

VI. COLLATERAL

A. ASSUMPTIONS

87. Our below assessment is based on the assumptions made in Chapter II as well as the following additional assumptions:

(a) Although it is a bilateral form in that it contemplates that each party may be required to post collateral to the other, we assume that (i) the Counterparty is at all times Transferor ("**Collateral Provider**") under the Credit Support Annex and (ii) that the collateral is owned by the Counterparty or that the Counterparty is authorized and empowered to transfer ownership in the collateral.

(b) The counterparties agree that Eligible Credit Support will include Cash and Letters of Credit. Cash is denominated in a freely convertible currency and is held in an account under the control of the Transferee ("**Collateral Taker**") maintained in the jurisdiction of the relevant currency.

B. GENERAL REMARKS

88. Please note that it may be relevant for the purposes of this Opinion whether the Counterparty is incorporated or otherwise organised in Liechtenstein, or whether it is a foreign entity with a branch or other place of business in Liechtenstein. As we were not specifically instructed to address the latter constellation independently in detail and as this would require substantial further scrutiny, this Opinion does not cover such a constellation.

89. Furthermore, we point out that the location of the Collateral Taker may adversely affect the effectiveness of a General Agreement and its respective Credit Support Annex and subsequently the positions of the contracting parties. Specific provisions under Liechtenstein law, which provide a certain level of legal security with regard to financial collateral arrangements are not applicable, if one of the contracting parties is located outside of the EEA or Switzerland. Thus, contracts between a Counterparty and a non-EEA/Swiss entity and such between a Counterparty and an EEA/Swiss entity may be subject to different conclusions under this Opinion.

90. In light of the above, we note that once the UK has left the EU (Brexit) and is no longer an EEA member, the applicable framework for UK counterparties can at this point not be predicted. Hence, this Opinion may not be relied upon after Brexit and should be updated.

91. As an extensive discussion of the provision of collateral under the EFET Credit Support Annex would go beyond the scope, the below analysis focuses on the main topics and provides a high level overview only.

92. Furthermore, as the assessment of the provision of collateral with regard to specific types of Counterparties, especially Banks, Investment Firms and Insurance Companies would go beyond the scope of our instruction, do not render any opinion thereon.

93. According to the Credit Support Annex Eligible Credit Support shall mean either:

    (a) Cash; or
    (b) a Letter of Credit.

    Without having reviewed a Letter of Credit and from the definition provided in the Credit Support Annex, describing a Letter of Credit as a standby letter of credit, bank guarantee or similar document which obliges the bank to pay the amount guaranteed therein upon first demand of the Collateral Taker, we conclude that a Letter of Credit constitutes a contractual obligation the bank vis-à-vis the Collateral Taker. Such contractual obligations do not fall within the material scope of the provisions implementing the FCA-Directive. Furthermore, in our opinion, no outright transfer in ownership can be effected regarding such a Letter of Credit, thus, the assessment below only deals with Cash collateral. At this point we also note that a Letter of Credit can from a Liechtenstein law perspective in our opinion not be included in a set-off, as it does not constitute a contractual obligation between the parties to the General Agreement, but a contractual obligation between one party to the General Agreement and a third party, in particular a bank.

C. CONFLICT OF LAW ISSUES – PROPERTY LAW ASPECTS/LEX CONCURSUS

94. Generally speaking, *rights in rem*, such as ownership or a pledge, under Liechtenstein law may be created and transferred on the grounds of *titulus* and *modus*. *Titulus* must be a valid contractual agreement or other obligation to transfer the ownership and a choice of law will in general be accepted with regard to the *titulus*, while the *modus* is the valid transfer of ownership/possession and the law applicable to the *modus* is not subject to the parties' disposition.

95. Generally speaking Art. 34 et seqq. IPRG stipulates that the acquisition and loss of *rights in rem* with regard to movable property is qualified on the basis of the applicable law in the jurisdiction in which the asset is located at the time of the completion of the transfer of ownership (*lex rei sitae*). With regard to Cash collateral – which is the only type of collateral discussed in this Opinion (see above) – the Liechtenstein IPRG does not explicitly address the law applicable to the transfer and creation of such. The creation of Cash collateral under the Credit Support Annex will either be effected by wire transfer or be qualified as an assignment for security purposes, which requires a *titulus* and *modus* regarding the creation/transfer of the collateral.

96. However, cash credited to an account merely constitutes a claim for repayment against the respective account maintaining bank and is not considered to be a movable asset. In light of this Art. 34 et seqq. IPRG will not be applicable to Cash. In conclusion, the creation of Cash collateral will be effected by assignment of claims for security purposes. In lack of an explicit provision regarding the law applicable to the *modus* in such a case, the basic rule relating to the strongest relationship must be applied in accordance with Art. 1 para.

2 IPRG. There is case law[63] and legal writing[64] that suggests that the *modus* and other requirements (such as publicity) with regard to the security assignment will be governed by the law applicable to the assigned claim. As the assigned claim is one of the account holder against the bank or institution maintaining the account, the contractual relationship between the bank and the Collateral Provider will be decisive. This may either be the law chosen in this contractual relationship (Art. 39 IPRG), or in lack of such determination the law of the place, where the bank or financial institution maintaining the account is located (Art. 42 IPRG).

97. There is no explicit provision, case law or legal writing dealing with the *modus* in the case of a direct transfer. The transfer may be effected by a chain of remittance processes. If one assumes that the last remittance from the bank, which maintains the account of the Collateral Taker to the Collateral Taker would be qualified as *modus*, then the law applicable to the relationship between the Collateral Taker and the bank or institution, which maintains the relevant account could be deemed the relevant applicable law. This may again either be the law chosen in this contractual relationship (Art. 39 IPRG), or in lack of such determination the law of the place, where the bank or financial institution maintaining the account is located (Art. 42 IPRG).

98. As outlined above, it is not conclusively settled under Liechtenstein law, which law governs the proprietary aspects (*modus*) of the creation and validity of Cash collateral created by security assignment or wire transfer. There are, however, good reasons to argue that the law applicable to the relevant account relationship would be decisive.

99. As a result, we believe Liechtenstein law will not be decisive in determining whether Cash collateral has validly been created where the relevant contractual relationship, which may either be the relationship between the Collateral Taker and the account maintaining bank in case of a wire transfer or the relationship between the Collateral Provider and the respective account maintaining bank in case of an assignment of claims for security purposes, is not governed by Liechtenstein law. Whenever Liechtenstein law is not applicable a Liechtenstein Court will assess the validity under the foreign laws applicable to the relevant banking relationships.

100. The enforcement of collateral in case of insolvency will be governed by the law applicable to the insolvency (*lex concursus*). With regard to the applicability and scope of insolvency proceedings according to the IA, BA and ISA we refer to Chapter IV B, E and G, concerning recovery and resolution proceedings to Chapter IV F.

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[63] öOGH vom 19.10.2000, 2 Ob 265/00k = ÖBA 2002, 1011.

[64] Schwimann, Grenzüberschreitende Sicherungszessionen im gegenwärtigen und künftigen IPR, wbl 1998, 385; Verschraegen in Rummel ABGB³ § 31 IPRG (Stand 1.1.2004, rdb.at) RZ 48, 49.

D. FINANCIAL COLLATERAL ARRANGEMENTS UNDER LIECHTENSTEIN LAW

(a) Financial Collateral Arrangements under Art. 392 et seqq. SR.

i. Personal Scope of Art. 392 et seqq.

101. The validity and enforceability of collateral provisions under Liechtenstein law relies on the provisions of the Liechtenstein SR. The provisions of Art. 392 SR et seqq. SR implement the FCA-Directive.

102. The applicability of Art. 392 et seqq. SR with regard to non-EEA counterparties is not conclusively settled under Liechtenstein law. As pursuant to Art. 392 para. 1a SR Switzerland is treated as equal to EEA Member States, we conclude – *argumentum e contrario* – that only EEA or Swiss counterparties fall within the personal scope of Art. 392 et seqq. SR.

103. In light of the above, Art. 392 et seqq. SR apply to Collateral Takers and Collateral Providers, if they qualify as professional financial market participants according to the FCA-Directive, provided that both parties are located in the EEA or Switzerland.

104. Pursuant to Art. 1 para. 2 (c) FCA-Directive, financial institutions subject to prudential supervision, hence credit institutions such as Banks, Investment Firms and Insurance Companies, but also collective investment undertakings regulated under the UCITS-Directive and their management companies are considered professional financial market participants. In conclusion, Corporations and Partnerships as defined in Appendix A are not considered professional financial market participants.

105. In addition, also "semi-professional" financial market participants, as defined in Art. 1 para. 2 (e) FCA-Directive, can rely on the provisions of the implementation law, as long as the counterparty is a professional market participant.

106. **In light of the above, the Art. 392 et seqq. SR, implementing the FCA-Directive only apply, if both parties to the agreements are located in the EEA or Switzerland. With respect to Counterparties organized as Corporations and Partnerships as defined in Appendix A, it is in addition essential for the applicability of Art. 392 et seqq. SR, that the respective counterparty is considered a professional market participant as outlined above.**

ii. Material Scope of Art. 392 et seqq.

107. Collateral falls within the material scope of Art. 392 et seqq. SR, if its purpose is to secure Relevant Financial Obligations and it consists of cash[65], FCA-Financial Instruments or Credit Claims for security, which are based upon the transfer of full ownership of the collateral or security interest (within the meaning of Recital 3 of the FCA-Directive), independent of the arrangement of the collateral in a master agreement or general terms and conditions.[66] Only obligations which give a right to cash settlement and/or delivery of FCA-Financial Instruments whether consisting of present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar agreement) can be considered a Relevant Financial Obligation.[67]

108. According to the Credit Support Annex, collateral shall consist of Cash or Letters of Credit. In our opinion Cash collateral provided under the Credit Support Annex falls within the material scope of Art. 392 et seqq. SR, whereas Credit Letters, on which we do not render any opinion as outlined above, do not fall within the material scope of Art. 392 et seqq. SR.

iii. Title Transfer Financial Collateral Arrangements

109. "Title Transfer Financial Collateral Arrangement" (hereinafter the "**Title Transfer**") in the sense of Art. 392 et seqq. SR means a collateral arrangement where the Collateral Provider transfers full ownership of collateral to the Collateral Taker for the purpose of securing or otherwise covering the performance of Relevant Financial Obligations;[68] each consisting of cash, FCA- Financial Instruments or Credit Claims, whether or not these are covered by a master agreement or general terms and conditions.

110. In order to effect a valid Title Transfer as defined above, it is necessary to conclude a valid contractual obligation and to transfer the ownership with regard to the collateral by an act of disposition. In accordance with the Roman law principles of *titulus* and *modus*, the contractual obligation to transfer ownership (*titulus*) and the act of disposition creating and perfecting the transfer of ownership (*modus*), must be complied with.

111. The Credit Support Annex as a written agreement constitutes a valid *title* according to Liechtenstein law. Further, if Arts. 392 et seqq. SR are applicable, both the Provision of the collateral (see below Section 109) and the Title Transfer itself must be evidenced in writing, whereby "writing" includes recording by electronic means and any other durable

[65] In this context meaning: Money credited to an account in any currency (e.g. Euros, Pounds Sterling or US Dollars), or similar claims for the repayment of money, such as money market deposits, but not physical cash.
[66] Art. 392 para. 2 (1) SR.
[67] See definition of „Relevant Financial Obligations" above.
[68] See definition section. Art. 392 para. 2 (2) SR.

medium and allows the provision of collateral under a master agreement or general terms and conditions.[69] As outlined above Cash collateral may be provided by way of assignment of claims or other assignable rights for security purposes or wire transfer. In case of an assignment of claims for security purposes the according information to the bank maintaining the account affected by such assignment of claims for security purposes, is the sufficient act of disposition (*modus*). In the case of wire transfer the *modus* is not conclusively settled, where the relevant account is held in the name of the Collateral Taker. If, however, Cash is transferred to an account held in the name of the Collateral Provider, we are of the opinion that the provisions on the *modus* of an assignment of claims for security purposes have to be met and thus the account maintaining bank must be informed accordingly.

112. The collateral must be provided to the Collateral Taker or a person acting on the Collateral Taker's behalf, i.e. duly delivered, transferred, held, registered or otherwise designated so that the Collateral Taker is in the possession or in sole control of the collateral ("**Provision of Collateral**").[70] Although the right of the Collateral Provider to substitute, withdraw exceeding Collateral or collect the income from Credit Claims does not hinder the Provision of Collateral from being effective, the Collateral Provider must effectively be prevented from disposing of the Collateral.[71] This shall ensure that the Collateral Taker identified in the Title Transfer is actually in a position to dispose of the collateral when an enforcement event occurs.[72] Therefore, transfer substitutes, as provided by Liechtenstein law, do not constitute a valid Provision of collateral.[73] As outlined above the Provision must be evidenced in writing and the evidence must allow the identification of the respective collateral.[74] For this purpose, it is sufficient to prove that the Cash collateral has been credited to, or forms a credit in, a designated account.

113. Both, the transfer of assets for security purposes and the assignment of claims and other assignable rights for security purposes, are not accessory to the secured obligations in the manner of pledges.[75] However, as they are created for security purposes they still cannot be validly created in the absence of a secured obligation. Thus, it must be clear that the respective collateral serves the purpose of securing Relevant Financial Obligations. As it is not conclusively settled, if and under which circumstances a Liechtenstein court would recognize the provision of Collateral by direct wire transfer and the purpose of the transaction in any case will be the creation of security for the Collateral Taker, we believe

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69 *Opilio*, Arbeitskommentar zum Liechtensteinischen Sachenrecht (2010) vor Art 392, 342.
70 See ECJ Case C-156/15 – IS SIA v *Swedbank*.
71 Art. 392 para. 2 (13) SR.
72 See ECJ Case C-156/15 – IS SIA v Swedbank, 41.
73 See ECJ Case C-156/15 – IS SIA v Swedbank, 44.
74 Art. 393 para. 1 SR.
75 See BuA 2016/43, p. 113.

it is advisable to fulfill the requirements applicable to a security assignment, as far as they do not harm the nature of the direct transfer.

114. **In light of the above, we conclude that a collateral arrangement created under the Credit Support Annex will be deemed a Title Transfer and thus the respective provisions of the implementation law as stipulated in Art. 392 et seqq. SR apply, if:**

(1) both, the Counterparty and its counterparty qualify as professional market participants or one of them as a professional and the other as a semi-professional financial market participant and both are located in the EEA or Switzerland;

(2) the Eligible Credit Support consists of Cash, FCA-Financial Instruments or Credit Claims in accordance with Art. 392 para. 2 (4), (5) and (12) SR; and

(3) the respective collateral serves the purpose of securing Relevant Financial Obligations.

Furthermore, there must be a written collateral agreement in place and the Collateral Taker needs to obtain possession or control of the Collateral. Finally, the Provision of Collateral must be evidenced in writing and this evidence must allow the identification of the Collateral to which it applies.

E. TRANSFER OF FULL OWNERSHIP

115. It is specifically intended that the Credit Support Annex effects a Title Transfer to the recipient and does not create a security interest or similar right of any kind.[76] Regarding Cash collateral the ABGB stipulates that the assignment of claims and other assignable rights for security purposes (*Sicherungszession)* effects a full transfer of rights. The Collateral Taker in these cases is under a contractual obligation to return the original collateral upon discharge of the secured obligation. The assignment of claims and other assignable rights for security purposes is not accessory to the secured obligations in the manner of pledges. However, as they are created for security purposes, they still cannot be validly created in the absence of a secured obligation.

116. Wherever the special provisions of Art. 392 et seqq. SR are applicable, but do not provide for specific regulations concerning financial, the general provisions governing pledges and assignment of claims and other assignable rights for security purposes will be applicable with regard to Cash collateral.

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[76] § 7 of the Credit Support Annex.

117. If Liechtenstein law applies to the creation and maintenance of Cash collateral (see above), the applicability of Art. 392 et seqq. SR plays a major role for the following reason:

(a) Applicability of Art. 392 et seqq. SR:

118. Art. 392 et seqq. SR provides for the recognition of the title transfer for Cash collateral in Liechtenstein. In order to create a valid Cash collateral, the general requirements of the provision of financial collateral as outlined above have to be complied with.

(b) Non-applicability of Art. 392 et seqq. SR:

119. If, however, Art. 392 et seqq. SR are not applicable, the general provisions of Liechtenstein law have to be taken into consideration. Under these provisions, a cash balance of an account maintained by a bank or institution is considered a mere claim for repayment against the respective institution. Although the Credit Support Annex provides for a "title transfer", the Collateral Taker only receives and holds a claim for repayment against the bank or institution, which maintains the account. According to Liechtenstein law, ownership can only be justified in property within the meaning of the SR. However, book money is not regarded as property under the SR, which is why no title to it can be justified.

120. The effects of a transfer of Cash collateral from the Collateral Provider to the Collateral Taker for security purposes are not conclusively settled under Liechtenstein law. In principle, bank deposit money can be transferred to the Collateral Taker in two ways, either by wire transfer or as a claim against the bank or institution by assignment.

- Wire transfer: In case of a wire transfer to a bank account of the Collateral Taker, the bank or institution maintaining the account checks the receipt of payment and credits the transferred amount. Since the cash balance is considered as claim against the bank or institution, the bank or institution acknowledges its debt in a written account statement. By wire transfer, a claim for surrender of cash to the bank or institution maintaining the account is procured. If such wire transfer takes place for security purposes, the Collateral Taker is externally entitled to dispose of the claim against the bank or institution maintaining the account vis-à-vis third parties, but internally bound by the contractual agreement concluded with the Collateral Provider to use the Cash collateral only under the contractual conditions. From a legal point of view, there are similarities to a transfer of assets for security purposes (*Sicherungsübereignung*; for further information see above), whereby no ownership right is transferred due to the lack of possibility of establishing ownership on book money. Instead, a claim is created against the bank or institution maintaining the account for security purposes.

- Assignment: The account holder's claim against the bank or institution maintaining the account for the repayment of a cash amount can be assigned from the assignor to the assignee. The assignment means that the assignee is entitled to the claim of the assignor against the bank or institution maintaining the assignors' account. In case the cash amount will be credited in or transferred to an account of the Collateral Provider subject to the restriction that the Collateral Provider may not dispose of it while providing the Cash collateral and the Collateral Provider assigns its claim against the bank or institution maintaining the account for the repayment of cash, there is an assignment for security purposes. In order to avoid payments from the cash balances to the Collateral Provider, the bank or institution maintaining the account must be informed of the assignment. The provisions on the assignment for security purposes (*Sicherungszession*; for further information see above) apply.

121. Depending on whether the Cash collateral is for security purposes in a bank account of (a) the Collateral Provider or (b) the Collateral Taker, the provision of Cash Collateral is considered as (a) assignment or (b) wire transfer. In both cases, the creation of a title transfer over a cash balance does not create ownership of the book money, but a full entitlement of the Collateral Taker to the claim against the bank or institution maintaining the account. The Collateral Taker becomes a fully entitled creditor for security purposes, but is bound by the obligation to retransfer the cash balance under the agreed conditions. In any case, the Collateral Taker must bear the insolvency risk of the bank or institution maintaining the account. The rights to which the Collateral Taker is then entitled depend on the law applicable to the insolvency proceedings of the bank or institution maintaining the account. Where no third party is involved and the Cash collateral is transferred to an account of the Collateral Taker maintained by the Collateral Taker itself, special attention must be paid and we do not render any opinion on such a set-up in this Opinion.

F. SPECIFIC QUESTIONS

122. *Under the laws of Liechtenstein, what law governs the transfer of ownership in the various forms of Eligible Credit Support deliverable under the EFET Credit Support Annex?*

As mentioned above, it is not conclusively settled what law will be applicable to the transfer of Cash collateral and we do not render an opinion on Letters of Credit.

We believe Liechtenstein law will not be decisive in determining whether Cash collateral has validly been created where the relevant contractual relationship, which may either be the relationship between the Collateral Taker and the account maintaining bank in case of a wire transfer or the relationship between the Collateral Provider and the respective account maintaining bank in case of an assignment of claims for security purposes, is not governed by Liechtenstein law (see Chapter VI C above).

123. *Would the laws of Liechtenstein characterize each transfer of collateral as effecting an unconditional transfer of ownership in the assets transferred? Is there any risk that any such transfer would be re-characterized as creating a security interest? If so, is there any way to minimize such risk? What would be the consequences of such a re-characterization?*

Where Art. 392 et seqq. are applicable, the intended title transfer is recognized in Liechtenstein. As legal materials provide that the Collateral Taker shall remain the owner of the Collateral upon effective transfer even in the event that insolvency proceedings are commenced against the Collateral Provider and in this context refer to Recital 13 of the FCA-Directive, which stipulates that the FCA-Directive seeks to protect the validity of Title Transfer of the Collateral, such as by eliminating the so-called re-characterization of such Title Transfer, there is no risk of re-characterization whenever Art. 392 et seqq. SR are applicable.

If, however, Art. 392 et seqq. SR are not applicable Liechtenstein law does not provide for or recognize ownership or the transfer of ownership in Cash credited to a bank account. Cash deposited in an account with a bank legally constitutes a payment claim of the account holder against the bank or institution, which maintains the account. In the event of an assignment of the claim to the Collateral Taker (e.g. the Collateral Provider is the account holder), the account-holding bank must be informed of this assignment and the Collateral Taker will bear the insolvency risk of the bank. If Art. 392 et seqq. SR are not applicable, transfer will be re-characterised and qualified as an assignment of claims and other assignable rights for security purposes which will be treated as pledges in the case of insolvency.[77] As a consequence of the re-characterization as assignment of claims and other assignable rights for security purposes, the provisions regarding pledges and concerning the necessity of publicity regarding a pledge provision must be met. Otherwise the transfer of ownership title will not be considered valid. If the ownership title was transferred in accordance with the provisions regarding pledges, the Collateral Taker will be treated as a preferential creditor upon the commencement of insolvency proceedings over the assets of the Collateral Provider, but will not have Right to Preferential Settlement (see below).[78]

[77] Art. 23 para. 3 IA; LES 1992, 144; LES 1993, 12.
[78] Art. 23 para. 3 IA; LES 1992, 144; LES 1993, 12.

The Liechtenstein IA recognizes *rights in rem* of third parties in insolvency proceedings. Such third parties have special rights to settlement on the grounds of their positions as holders of *rights in rem*. Creditors who have ownership in certain items will be granted a Right to Preferential Settlement, as these items are not the property of the debtor and thus are not part of the insolvency estate, i.e. their ownership will not be affected by the opening of insolvency proceedings. Collateral Takers will have such a Right to Preferential Settlement in the case of a valid Title Transfer. If the requirements of Art. 392 et seqq. SR are not met by the transfer and thus, it will be deemed to be an assignment of claims or other assignable rights for security purposes, the Collateral Taker will not have a Right to Preferential Settlement as the right acquired will be treated as similar to a pledge. Instead, the Collateral Taker will have the Right to Separate Settlement.

124. *Assuming that Party B receives absolute ownership in the collateral, will it need to take any action thereafter to ensure that its title therein continues? Are there any requirements in Liechtenstein necessary or advisable, including any filing, registration, notification, stamping, notarisation or any other action or the obtaining of any governmental, judicial, regulatory or other order, consent or approval? Are there any other procedures that must be followed or consents or other governmental or regulatory approvals that must be obtained or established, to enforce, or continue such ownership interest?*

No, no perfection requirements in addition to those outlined in our Opinion will have to be fulfilled.

125. *What is the effect, if any, under the laws of Liechtenstein of the right to substitute collateral pursuant to § 6 of the EFET Credit Support Annex? Does the presence or absence of consent to substitution by Party B have any bearing on this question?*

Under Liechtenstein law and wherever Art. 392 et seqq. SR are applicable, it is possible to validly agree upon substitution in the Transfer Annex and such right does not adversely affect the validity of the Provision of collateral. The Collateral Taker can substitute collateral and give back alternative collateral, if this has been agreed.[79] However, we note that the transfer of the collateral back into the sole possession of the Collateral Provider with the Collateral Taker's consent, even for the sole purpose of substitution, will result in the Collateral Taker losing its ownership rights over said collateral.

If Art. 392 para. 3 SR is not applicable and the transaction is qualified as an assignment of

[79] Art. 392 para. 2 No 13 SR; Art. 392 para. 3 SR in conjunction with Art. 2 para. 2 FCA; *Opilio*, Arbeitskommentar zum Liechtensteinischen Sachenrecht zu Art. 397 RZ 2 (2010).

claims or other assignable rights for security purposes, the substitution of collateral can be validly agreed upon. However, there is no clarification comparable to Art. 2 FCA-Directive with regard to the effects of such substitution of collateral. The general provision of Art. 370 para. 2 SR, which is in lack of specific provisions also applicable to an assignment of claims for security purposes, stipulates that the pledge has no effect as long as the collateral is under the exclusive control of the pledger with the creditor's will. The Collateral Provider may not at any time be able to dispose of the collateral at its own discretion without the Collateral Taker losing its rights in the collateral. Thus, since the provision in this case requires publicity,[80] the transfer of the collateral back into the sole possession of the Collateral Provider, even for the sole purpose of substitution, will result in the Collateral Taker losing its ownership rights over said collateral.

In light of the above, we thus recommend that the Collateral Taker in accordance with § 6 Credit Support Annex only transfers collateral back into the possession of the Collateral Provider upon receipt of the replacement collateral.

We note that a substitution without consent will not be possible under Liechtenstein law, as the effective and valid Provision of collateral requires that the Collateral Taker has gained full control over the collateral.

Further, we note that a substitution of Collateral must be evaluated in light of the transaction avoidance provisions under Liechtenstein law as outlined in Chapter IV C.

126. *Party B's right in relation to the transferred collateral upon termination of the relevant master agreement will be governed by § 11 of the General Agreement together with §11 of the Credit Support Annex. Assuming that § 11 of the General Agreement is valid and enforceable in Liechtenstein insofar as it relates to the determination of a net amount payable by either Party on the termination of Individual Contracts, is § 11 of the Credit Support Annex also valid to the extent that it provides for the value of the collateral provided and not yet transferred to be included in the calculation of a net amount payable under § 11 of the General Agreement as "other amounts payable"?*

It is a general principle of contract law that parties are relatively free in entering into contractual agreements declaring certain claims to be eligible for set off under certain circumstances – for example even in cases where such claims are not yet due. And, even if set off has not been contractually agreed, claims, which are mutual, legally valid and recoverable, due and "of the same kind" are eligible for set-off on the basis of the law (§ 1438 ABGB). Claims which could already be offset at the time of the opening of

[80] LES 1993, 12.

insolvency proceedings need not be asserted in these proceedings.

In case of insolvency, Arts. 32 and 33 IA apply to the set-off by an insolvency creditor against a claim, which belongs to the insolvency estate. The set-off is not permitted if a creditor only becomes a debtor of the bankrupt's assets after insolvency proceedings have been initiated or if the claim against the insolvent party has only been acquired after insolvency proceedings have been opened. The same applies, if the debtor acquired the counterclaim prior to the opening of bankruptcy, but was or should have been aware of the bankruptcy of the common debtor at the time of acquisition. However, offsetting is permissible if the debtor acquired the counterclaim earlier than six months before bankruptcy or if he was obliged to assume the claim and, when entering into this obligation, had neither knowledge nor had to have knowledge of the insolvency.

Further, pursuant to Art. 33 para 4 IA claims are eligible for set-off deriving from the termination of a Financial Collateral Agreement pursuant to Art. 392 et seqq. SR, which has been terminated due to the initiation of insolvency proceedings, if the termination of the agreement was agreed in case of initiation of insolvency proceedings over the assets of a contracting party or agreements that can be terminated by the other contracting party in case of initiation of insolvency proceedings and all claims shall be set off as a consequence of the termination.

However, with regard to collateral not falling under Arts. 392 et seqq. SR, Art. 33 para 4 IA is not applicable. Thus, there is no comparable explicit provision allowing the set-off of claims arising from collateral transactions, where the creditor only becomes a debtor of the bankrupt's assets after insolvency proceedings have been initiated or if the claim against the insolvent party has only been acquired after insolvency proceedings have been initiated. Also, the corresponding provision in Art. 398 SR allowing for the set-off notwithstanding the commencement of winding-up proceedings or reorganisation measures and notwithstanding the assignment or pledge (e.g. judicial pledge) or other disposal of claims subject to netting is not applicable. Further, if Arts. 392 et seqq. SR are not applicable there is no explicit provision to secure that an obligation of the Collateral Taker to transfer equivalent collateral under a Transfer Annex may be subject to a set-off, if an enforcement event occurs (Art. 397 para. 2 SR).

Thus, if Arts. 392 et seqq. SR are not applicable, a set-off will not generally be effective under Liechtenstein law despite existing claims of creditors in insolvency proceedings and third parties who have acquired rights to a claim subject to set-off. Further, the insolvency resistance of Collateral must be considered in light of the remarks on transaction avoidance and enforceability as outlined above in Chapter IV C.

Further, if Arts. 392 et seqq. SR are not applicable, there is no provision that confirms the validity of insolvency-related termination. However, there is case law that suggests that insolvency related termination is nevertheless valid.[81]

To conclude, we believe the current legal framework under Liechtenstein law does not afford adequate certainty to confirm the validity of such clause under Liechtenstein law if Arts. 392 et seqq. SR are not applicable.

127. *Are the rights of Party B enforceable in accordance with the terms of the General Agreement and the Credit Support Annex, irrespective of the insolvency of Party A?*

If Arts. 392 et seqq. SR are applicable in the case of a Title Transfer, the right of Party B over the collateral as Collateral Taker to realize the Collateral is enforceable, irrespective of the insolvency of the Collateral Provider. Assuming that the Collateral Taker obtains an absolute interest, the Collateral Taker will not need to take any further action in order to secure its title in the collateral. However, if Art. 392 et seqq. SR are not applicable, the right of Party B over the collateral as Collateral Taker to realize the Collateral outside the Liechtenstein insolvency proceedings over the assets of the Collateral Provider is not enforceable.

We note, that we have only assessed the enforceability under the IA, as an assessment regarding the enforceability upon commencement of insolvency or moratorium proceedings according BA, SAG, NVG and ISA would require further scrutiny.

128. *Will Party A (or its receiver or other similar official) be able to recover any transfer of collateral provided to Party B during a certain "suspect period" preceding the date of the insolvency? If so, how long before the insolvency does the suspect period begin? If such a period exists, does the substitution of collateral by a counterparty during this period invalidate an otherwise valid transfer, assuming the substitute assets are of no greater value than the assets they are replacing? Is the transfer of additional collateral pursuant to the mark-to-market provisions of the EFET Credit Support Annex during the suspect period subject to avoidance, either because it was considered to relate to an antecedent or pre-existing obligation or for some other reason?*

There is no general suspect period in Liechtenstein and we refer to Chapter IV C with regard to transaction avoidance measures in general and to Section 122 regarding the

[81] See ö OGH, RIS-Justiz RS0018324. We refer to Austrian case law in this regard, as the Liechtenstein IA contains very similar provisions as the Austrian IO. It has to be noted, however, that due to a change in Austrian legislation in 2010, recent Austrian case law is not relevant anymore in this respect, see e.g. öOGH, 21.11.2013, 1 Ob 157/13i.

substitution of collateral.

129. *Is the EFET Credit Support Annex in an appropriate form to create the intended outright transfer of ownership in the collateral to Party B? Are there any other requirements to be observed in Liechtenstein in order to ensure validity of such transfer in each type of Eligible Credit Support created by Party A under the EFET Credit Support Annex? For example, are there any other requirements such as those mentioned under above?*

Wherever Art. 392 et seqq. SR are applicable, the Credit Support Annex is a valid *titulus* for creating the intended outright Title Transfer in the Cash collateral. If Art. 392 et seqq. SR should not be applicable, Liechtenstein law does not recognize the concept of a full ownership transfer regarding claims (see Section 120).

VII. GENERAL ENFORCEABILITY

130. For the avoidance of doubt, our assessment below is based on the general assumption made in Chapter II (b), in particular, that the General Agreement is governed by the laws of Germany or England and Wales. As a choice of law regarding contractual relationships will in general be recognized and upheld by Liechtenstein courts, we only assessed whether or not certain provisions of the General Agreement would be in breach of the *ordre public* and thus not enforceable.

131. We are of the opinion that none of the provisions set out in the General Agreement are incompatible with the fundamental values of the Liechtenstein legal system and thus in breach of the *ordre public* according to Art. 6 IPRG.

132. We hold that neither § 7 General Agreement dealing with non-performance due to Force Majeure, nor § 8 General Agreement concerning remedies for non-performance violate the Liechtenstein *ordre public*.

133. Also the limitation of liability provided in § 12 General Agreement will be enforceable in Liechtenstein. In this regard we do, however, note that according to Liechtenstein law, a liability limitation is in any case only valid with regard to damages that each party could foresee. Exclusions of liability shall be invalid if the contracting parties could not have reckoned with the possibility of particular damages.[82]

134. In conclusion, the provisions of the General Agreement do not violate the *ordre public* according to Art. 6 and will thus be enforceable in Liechtenstein.

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[82] *Krejci* in *Rummel*[4], § 879 ABGB Rz 127.

VIII. CONFIRMATION PRACTICES

A. ASSUMPTIONS

135. In addition to the general assumptions made in Chapter II, we assume the following with regard to our assessment concerning confirmation practices:

(a) As far as the Confirmation Practice is concerned, when entering into an Individual Contract, the counterparties in each case (i) make oral reference to the General Agreement when concluding the relevant Individual Contract (for the purpose of this Opinion a Transaction) over the phone or (ii) refer to the General Agreement when subsequently exchanging confirmations or similar electronic, written or non-verbal means of entering into or confirming Transactions (in whichever form, including telex, fax, SWIFT or other means of electronic transmission)

(b) Parties may or may not (i) use the Electronic Confirmation Matching System to electronically match and exchange Confirmations or (ii) enter into the EFET Electronic Confirmation Agreement

B. BINDING INDIVIDUAL CONTRACT

136. According to Liechtenstein law a contract is concluded by correspondent declarations of intent by the persons involved. Under Liechtenstein law the freedom of form prevails with regard to the conclusion of contracts and thus, no particular statutory form is required to validly establish contractual obligations. In accordance with § 883 ABGB a contract may be concluded in writing or orally, before a court or not, with or without witnesses; and the respective form makes no difference in terms of the binding effect of such contracts, except in cases provided for by law. In addition to the above, also tacit or implicit agreements will be deemed binding on the parties, if each parties' intention to enter into a contract was recognizable for the other party without doubt.

137. The failure to object to incorrect terms in received Confirmations does in general not constitute acceptance under Liechtenstein law, this due to the fact that there is no reason to protect the party issuing the confirmation deviating from the agreement itself, against the party relying on the binding agreement. However, it is conceivable that under certain circumstances the in general declaratory Confirmation can be comprehended to have a meaning of a declaration of intent insofar as the Confirmation deviates from the agreement, the conditions set out in the Confirmation shall apply. The confirming party may rely on such a comprehension only to the extent that it can count on such an understanding of the other party according to bona fide common understanding, in particular if the Confirmation only deviates from the agreement in minor points or clarifies

issues deliberately left open.[83] As the General Agreement provides for the obligation to object to Confirmations deviating from the oral agreement in § 3.3, we believe the lack of objection could be understood as acceptance under certain circumstances.

138. Whether or not the Transaction will be included in the General Agreement, depends on the intent of the parties. Thus, if both parties intend to include the Transaction in the General Agreement the lack of explicit reference to the General Agreement does not prevent the inclusion, as the parties have agreed on such inclusion tacitly. Whenever one party intended to include the Transaction, whereas the other party did not, the inclusion will depend on the understanding of a bona fide recipient of the respective declaration of intent of each party. In such cases the explicit reference to the General Agreement will be of importance, as an unclear statement (declaration) will be interpreted to the detriment of the person who made it, according to § 915 ABGB.

C. MEANS OF EVIDENCE

139. In Liechtenstein the procedural principle of the free consideration of evidence prevails according to § 272 CCP, and Liechtenstein civil procedure is characterized by the principle of immediacy. Thus, only under special circumstances indirect evidence may be gathered.[84]

140. Witness statements, taped recordings or emails and other electronic message or transaction entry system or facsimile are permissible evidence in civil procedures conducted before Liechtenstein courts.

IX. CORE PROVISIONS

141. We do not believe that any selections contemplated by the General Agreement or the Credit Support Annex would effect the conclusions drawn in this Opinion materially, provided that the core provisions as outlined below, have not been modified.

142. We are of the opinion that the following are the Core Provisions, whose material alteration could affect the conclusions reached in this Opinion:

- § 1 General Agreement
- § 10.3 (a), (b) second sentence General Agreement
- § 10.5 (c) General Agreement
- § 11 General Agreement

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[83] *Rummel* in *Rummel*[4], § 861 ABGB Rz 30.
[84] § 276 CCP.

- The definitions contained in the General Agreement and the Credit Support Annex.

We cannot excluded that the alteration of a combination of other provisions of the General Agreement and Credit Support Annex might lead to a material change of the respective agreement that would affect the conclusions drawn in this Opinion. Such changes and their impact would have to be assessed on a case-by-case basis.

We are of the Opinion that the inclusion of the General Agreement in the CPMA Cross-Product Master Agreement, EFET Cross Product Payment Netting Agreement as well as the Master Netting Agreement, provided that no Core Provisions of the General Agreement have been amended, does not affect our conclusions drawn regarding the enforceability of the netting provisions of the General Agreement. For a matter of completeness, we note that we do not render any opinion on the enforceability of any provisions of the abovementioned agreements.

X. GOVERNING LAW, ARBITRATION AND JURISDICTION

A. ASSUMPTIONS

143. With regard to this chapter and in addition to the general assumptions made in Chapter II we make the following assumption:

(a) The relevant General Agreement is governed by the laws of a jurisdiction other than Liechtenstein (including English or German law).

B. CHOICE OF LAW

144. If conflicts of law issues arise in an international context, for example, if one of the contractual parties is located outside of Liechtenstein, the Liechtenstein IPRG applies. Pursuant to Art. 39 IPRG contractual obligations, have to be assessed under the law the parties explicitly or conclusively have determined to be applicable to the respective agreement. In the case of doubt, such a choice of law pursuant to Art. 11 IPRG excludes a renvoi, i.e. the parties choose the substantive laws of a jurisdiction to be applicable. A Liechtenstein court would uphold the choice of non-Liechtenstein law, as long as the provisions in the General Agreement and Credit Support Annex are not in conflict with Liechtenstein *ordre public* as stipulated in Art. 6 IPRG.

C. GENERAL REMARKS ON JURISDICTION AND ENFORCEABILITY

145. As a general remark, it should be noted that judgments rendered by a competent foreign court are not automatically enforceable in Liechtenstein. A court in Liechtenstein would only enforce judgments of foreign courts if enforcement is granted by respective treaties or by mutual promise according to Art. 52 EO. Furthermore, certain essential principles of Liechtenstein Law regarding competence of the court, service of court documents and finality of the judgment must have been respected in the foreign proceedings.

146. As Liechtenstein is not a member of the European Union, the Brussels Regulation does not apply. Liechtenstein is also not a contracting party to other international agreements on the recognition and enforcement of foreign decisions of ordinary courts, except with regard to Austrian and Swiss judgments. The latter are acknowledged and enforced on the basis of bilateral agreements with Austria and Switzerland. With regard to other jurisdictions, no treaties regarding the enforcement of foreign judgments or mutual promises exists. Therefore, judgments rendered by foreign will not be enforced in Liechtenstein. In such a case, the plaintiff could apply for recognition of the judgment and the issuance of a payment order with the Liechtenstein court. However, if the defendant opposes this, recognition could be refused. In this case new proceedings on the merits would have to be initiated in Liechtenstein. Thus, any final judgment obtained against the Liechtenstein counterparty in a foreign court (except Austrian and Swiss courts) will not be automatically recognized and enforced by the courts in Liechtenstein without potential re-examination or re-litigation of the matters adjudicated.

147. In respect of foreign arbitral awards, on July 7, 2011, Liechtenstein acceded to the New York Convention, which entered into force in Liechtenstein on October 5, 2011. On this basis, the recognition of foreign arbitral awards is granted and thus enforcement of a foreign arbitral award in Liechtenstein is possible in accordance with the New York Convention. Taking into account the fact that any final judgment obtained against a Liechtenstein counterparty in a foreign court (except Austrian and Swiss courts) would not be automatically recognized and enforced by the courts in Liechtenstein without potential re-examination or re-litigation of the matters adjudicated, an arbitration clause might be advisable. Arbitration clauses in contracts executed by both parties in writing are binding, when the requirements set out by law are complied with. Furthermore an arbitration clause has to display the intention of the parties to insinuate all or specific disputes related to a legal (contractual) relationship under the competence of an arbitral tribunal. Under the New York Convention the enforcement of foreign arbitral awards is ensured in Liechtenstein.

XI. REGULATORY REGIME

148. With regard to special considerations regarding the insolvency of certain Counterparties we refer to Chapter IV.

XII. QUALIFICATIONS AND LIMITATIONS

(A) This opinion is addressed to and solely for the benefit of EFET and its members solely for the purpose of advice in connection with the set of facts defined above. It is strictly limited to the matters stated herein and is not to be read as extending by implication to any other matter not specifically referred to herein.

(B) We render no opinion with regard to tax considerations or on whether the Liechtenstein counterparty has the legal capacity and power to enter into the General Agreement or Credit Support Annex.

(C) We render no opinion as to whether a counterparty provides regulated activities in Liechtenstein and therefore is subject to licensing requirements or supervision under Liechtenstein law.

(D) The Opinion is confined to and is given on the basis of the laws of Liechtenstein in force as of the date of issue. We express no opinion as to the laws of any other jurisdiction other than Liechtenstein, we have made no investigation of the laws of any jurisdiction outside Liechtenstein as a basis for the Opinion and do not express or imply any opinion thereon.

(E) We undertake no responsibility to notify EFET or its members of any change in Liechtenstein law after the date of this Opinion.

(F) This opinion is not to be relied upon by any other person or for any other purpose, nor is it to be quoted or referred to in any document, filed with any competent authority or made public in any way without our prior written consent. A copy may be shown by EFET or its members to , their competent regulatory, governmental or fiscal authority.

The extent of liability for the advice provided for in the Opinion is limited to CHF 1'000'000.00.

Please do not hesitate to contact us if you have any further questions about the matter discussed herein or any other issues.

Yours sincerely

Dr. iur. Hannes Arnold, M.B.L.- HSG

Appendix A

COVERED COUNTERPARTY TYPES

Bank/Credit Institution: A legal entity, which may be organized as joint stock corporation (*Aktiengesellschaft*) or European Company (*SE*), conducting banking activities on a professional basis and whose core business typically involves (a) taking deposits from private individuals and/or corporate entities and (b) providing loans to private individual and/or corporate borrowers. If the entity only conducts investment banking and trading activities, then it falls within the "Investment Firm" category below. This type of entity is referred to as a "credit institution" in European Community (**EC**) legislation.

The term Bank as used in this Legal Opinion refers to institutions that are licensed banks conducting banking activities on a professional basis under the Banking Act in Liechtenstein. There is no central bank in Liechtenstein, Central Banks are not covered by this opinion.

Investment Firm: A legal entity, which may be organized as joint stock corporation (*Aktiengesellschaft*) or European Company (SE), providing investment services and ancillary services referred to in Annex 2 Sections A and B of the Banking Act and are licensed under the Liechtenstein Banking Act. This type of entity is referred to as an "investment firm" in EC legislation.

Companies/Corporations: "Corporation" is a legal entity (*Verbandsperson*) with legal personality other than a private individual, organized as a corporation or company rather than a partnership, i.e. joint stock corporation (*Aktiengesellschaft*) or limited liability company (*Gesellschaft mit beschränkter Haftung*), under the Liechtenstein Act on Persons and Companies, having its corporate seat and place of effective management in Liechtenstein, which is engaged in industrial and/or commercial activities and does not conduct any business subject to regulatory supervision (e.g. Banks, Insurance Companies, Investment Firms) and thus does not fall within one of the other categories in this Annex A. When entering into the General Agreement the Company/Corporation acts within the corporate purpose.

Partnership: A legal entity established as a collective proprietorship (*Kollektivgesellschaft)* or limited partnership (*Kommanditgesellschaft*)

Insurance Company: A legal entity, which is organized as joint stock corporation (Aktiengesellschaft), Societas Europaea or Societas Cooperative Europaea, conducting insurance services on a professional basis and licensed under the Insurance Supervisions Act.

Publicly Owned Corporations

Appendix B

COVERED TRANSACTIONS

Commodity Forward: A transaction in which one party agrees to purchase a specified quantity of a Commodity at a future date at an agreed price and the other party agrees to pay a price for the same quantity to be set on a specified date in the future. The payment calculation is based on the quantity of the Commodity and is settled based, among other things, on the difference between the agreed forward price and the prevailing market price at the time of settlement.

Commodity Option: A transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of a call) or sell (in the case of a put) a specified quantity of a Commodity at a specified strike price. The option can be settled either by physically delivering the quantity of the Commodity in exchange for the strike price or by cash settling the option, in which case the seller of the option would pay to the buyer the difference between the market price of that quantity of the Commodity on the exercise date and the strike price.

Commodity Swap: A transaction in which one party pays periodic amounts of a given currency based on a fixed price and the other party pays periodic amounts of the same currency based on the price of a Commodity or an exchange-traded futures contract on a Commodity (e.g., the EEX EU Carbon Future); all calculations are based on a notional quantity of the commodity.

Physical Commodity Transaction: A transaction which provides for the purchase of an amount of a Commodity at a fixed or floating price for actual delivery on one or more dates.

"Commodity" means electricity, emissions allowances, certificates or capacity rights.